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Recent Developments in Aviation Law

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RECENT DEVELOPMENTS IN AVIATION LAW

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I. MONTREAL CONVENTION

"THE MONTREAL CONVENTION is not an amendment to the Warsaw Convention. . . . Rather, the Montreal Convention is an entirely new treaty that unifies and replaces the system of liability that derives from the Warsaw Convention."[1] The Convention "applies to all international carriage of persons, baggage[,] or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft by an air transport undertaking."[2] The Convention was ratified by the United States on November 4, 2003.[3]

The tension between the Montreal Convention and the interest expressed by some U.S. courts in having "localized controversies decided at home"[4] and in not burdening already-crowded U.S. courts with litigation having no relationship to the forum and its citizens was strongly evidenced in the most recent decision of the U.S. District Court for the Southern District of Florida, *In re West Caribbean Airways*.[5] This case presented numerous substantial legal obstacles to a forum non conveniens dismissal; however, the U.S. District Court for the Southern District of Florida remained focused on the absence of any relationship between the litigation and the United States.[6]

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[1] Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 371 n.4 (2d Cir. 2004), *quoted in* Gary A. Gardner & Brian C. McSharry, *The Montreal Convention: The Scram Jet of Aviation Law*, WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP (Apr. 2006).

[2] Convention for the Unification of Certain Rules for International Carriage by Air art. 1, May 28, 1999, S. Treaty Doc. No. 106-45, 2242 U.N.T.S. 350 [hereinafter Montreal Convention].

[3] Gardner & McSharry, *supra* note 1.

[4] *See, e.g.*, Pierre-Louis v. Newvac Corp., 584 F.3d 1052, 1061 (11th Cir. 2009).

[5] No. 06-22748, 2012 WL 1884684 (S.D. Fla. May 16, 2012).

[6] *See id.*

The *In re West Caribbean Airways* case is a consolidated action on behalf of representatives and heirs of a subset of deceased passengers that were on an aircraft that crashed in 2005 in Venezuela.[7] The aircraft was operated by defendant West Caribbean Airways.[8] All of the decedents were residents of either France or Martinique, and all, with one exception, were French citizens.[9] None of the passengers were U.S. citizens or residents.[10] The only connection to the United States was the involvement of two Florida corporations that had entered into a "charter contract" with West Caribbean to provide travel arrangements for the passengers.[11]

The lawsuit was originally filed in November 2006, pursuant to the Montreal Convention.[12] Pursuant to the venue provisions of the Montreal Convention, the claims could be asserted in the Southern District of Florida because Florida was the principal place of business of the defendant that had arranged the air travel.[13] The original suit was dismissed by the district court on the basis of forum non conveniens, and that decision was affirmed by the Eleventh Circuit Court of Appeals in 2009.[14] That Eleventh Circuit decision conflicts with "a [more] recent ruling by the French Supreme Court rejecting the application of the doctrine of forum non conveniens in Montreal Convention cases."[15]

Following the French Supreme Court ruling, the plaintiffs filed a Rule 60(b) motion for reconsideration of the prior Florida federal district court dismissal.[16] The U.S. District Court for the Southern District of Florida first reconsidered its original forum non conveniens dismissal in view of the French Supreme Court decision, and then restated its opinion that the forum non conveniens venue defense survives the venue provisions of the Montreal Convention because Article 33, Section 4 of the Convention states that all "'matters of procedure shall be gov-

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7 *Id.* at *1.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *See id.*

14 *Id.*

15 *Id.* (italicization omitted).

16 *Id.* at *3.

erned by the law of the court handling the case.'"[17] The court noted,

> Because forum non conveniens has been firmly rooted in the procedural law of the United States since before the Montreal Convention was written, and the Convention is silent on the doctrine, . . . the doctrine can continue to be applied to deny a plaintiff his choice of forum so long as another forum is available and can more conveniently adjudicate the claim.[18]

The court explained that the plaintiffs also attacked the forum non conveniens dismissal on the grounds that a companion case involving the crew members' claims against "domestic [U.S.] corporations . . . involved in the manufacture, maintenance, repair, ownership[,] and operation of the aircraft and its component parts" had been allowed to proceed in the United States.[19] The court noted that under the Montreal Convention,

> the airlines' fault is presumed and the only issue is damages, [whereas] the crew members had asserted claims under theories of negligence, willful misconduct, and strict product-liability, where 'complicated issues of product defect and causation' would have to be resolved by reference to evidence most probably located in the United States.[20]

The plaintiffs had also sought to intervene in the crew members' cases; however, those efforts were made more than four years after the crash and therefore were too late.[21]

In view of the district court's continued forum non conveniens analysis, the most significant factor was the plaintiffs' challenge to the jurisdiction of the Martinique court as an adequate alternative forum under the recent French Supreme Court ruling. The plaintiffs themselves had sought dismissal of their own claims in Martinique, which was granted because "under French law, Articles 33, 45[,] and 46 of the Montreal Convention establish that jurisdiction is determined *solely* by the plaintiff's choice."[22] Ultimately, this issue was presented to the French Supreme Court, which agreed that the choice of forum was "at the option of the plaintiff" under the Montreal Convention, and that no national court under any internal rule of pro-

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[17] *Id.* at *2.

[18] *Id.* (italicization omitted).

[19] *Id.* at *3.

[20] *Id.*

[21] *Id.* at *4.

[22] *Id.* (emphasis added).

cedure "can strip the plaintiff of that right."[23] Thus, the French Supreme Court declared the "current unavailability of the French venue" in Martinique.[24]

The plaintiffs here sought relief under Rule 60(b) by contending that "a party [may seek relief] from a final order based on 'any other reason that justifies relief.'"[25] The district court explained that it had previously determined that Martinique was an available forum and had directed the parties to litigate there.[26] The district court did not agree with the French Supreme Court's conclusion that the Montreal Convention precluded the application of the doctrine of forum non conveniens; therefore, the court concluded that while "[c]omity ordinarily requires United States courts to defer to foreign courts on the interpretation of their own jurisdictional statutes," the Montreal Convention is an international treaty, rather than an internal French statute.[27] Accordingly, the French interpretation of the Montreal Convention was not binding upon U.S. courts, and conflicting decisions "'merely reflect[ed] the realities of an international treaty being analyzed by various sovereign nations under their own guiding principles.'"[28]

Additionally, the court noted that U.S. courts do not "blindly accept the jurisdictional rulings or laws of foreign jurisdictions that purport to render their forum unavailable."[29] The U.S. district court took note of the decisions involving blocking statutes, such as the Panamanian statute that prevented "'suits brought in [Panama] as a result of a foreign judgment of forum non conveniens.'"[30] The court also noted the same result in the U.S. District Court for the Southern District of Texas in *Morales v. Ford Motor Co.*, which interpreted a similar Venezuelan blocking statute.[31]

Finally, the court rejected the plaintiffs' claim of extreme hardship, stating that hundreds of other plaintiffs had already litigated their cases to conclusion in Martinique without any jurisdictional impediment, and that "Martinique can assert juris-

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[23] *Id.* at *5 (emphasis omitted).

[24] *Id.*

[25] *Id.* at *6.

[26] *Id.* at *7.

[27] *Id.*

[28] *Id.*

[29] *Id.* at *8 (emphasis omitted).

[30] *Id.* (citing Scotts Co. v. Hacienda Loma Linda, 2 So. 3d 1013, 1015 (Fla. Dist. Ct. App. 2008)) (italicization omitted).

[31] *Id.*; *see* Morales v. Ford Motor Co., 313 F. Supp. 2d 672 (S.D. Tex. 2004).

diction over this litigation if and when Plaintiffs agree to it."[32] Additionally, the court noted that any hardship had been "invited," and that the plaintiffs "ran the risk that this [c]ourt would not reconsider its [forum non conveniens o]rder regardless of the consequences they would incur."[33] The court concluded that all but one of the plaintiffs were French nationals and residents who still had the right to pursue claims in French courts through other venue choices available under the Montreal Convention, despite the French Supreme Court's decision that the plaintiffs could not be stripped of their rights to assert an action in all of the forums available under the Montreal Convention.[34] The court noted that "[t]o now reverse course in response to the . . . Plaintiffs' persistent efforts to un-do the forum non conveniens dismissal would sanction Plaintiffs' disrespect for the lawful order of this United States court and encourage other litigants to engage in similar conduct."[35]

II. FOREIGN SOVEREIGN IMMUNITIES ACT

Absent a statutory or treaty-based exception to the grant of immunity, foreign states, their agencies, and their instrumentalities are immune from suit in federal court.[36] The Foreign Sovereign Immunities Act (FSIA) grants immunity "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act."[37] The FSIA recognizes an additional exception to the general grant of immunity if "the foreign state has waived its immunity either explicitly or by implication."[38]

In *Zhang v. Air China Ltd.*, the family of a passenger who perished after Air China failed to provide him with oxygen services for a short flight brought a wrongful death suit in the United States.[39] Air China argued that the suit was barred by the FSIA.[40] Air China also anticipated that the plaintiffs would argue that Air China was subject to the FSIA's commercial activity excep-

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[32] *In re W. Caribbean Airways*, 2013 WL 184684, at *9.

[33] *Id.* at *10.

[34] *Id.* at *12.

[35] *Id.* (italicization omitted). The oral argument in the appeal from this decision is currently scheduled to be heard in the U.S. Court of Appeals for the Eleventh Circuit on April 8, 2013.

[36] 28 U.S.C. §§ 1330(a), 1604 (2012).

[37] *Id.* § 1604.

[38] *Id.* § 1605(a)(1).

[39] Zhang v. Air China Ltd., 866 F. Supp. 2d 1162, 1164–65 (N.D. Cal. 2012).

[40] *Id.* at 1168.

tion.[41] The court held that a service receipt for oxygen services issued to the decedent's son in California was sufficient to establish the nexus with the United States that is required for the commercial activity exception to apply.[42]

In *Havlish v. bin Laden* (*In re Terrorist Attacks on Sept. 11, 2001*), the estates of fifty-nine September 11th victims sought damages "from the individuals and entities that carried out, or aided and abetted, the September 11th attacks."[43] Some of these defendants claimed to be sovereign, e.g., Iran and Hezbollah.[44] Regarding the FSIA exception for state-sponsored terrorism, the court observed that the exception had prompted a "'sea change' in suits against state sponsors of terrorism."[45] Rather than proving their entitlement to damages based on state or foreign law, the plaintiffs could prove their entitlement to damages based on a uniform federal standard that draws from legal principles in the *Restatement of Torts* and other leading treatises.[46]

In *Aero Union Corp. v. Aircraft Deconstructors International LLC*, the issue was whether a limited period of discovery was appropriate to determine whether a military-grade aircraft was immune to attachment pursuant to FSIA.[47] The court acknowledged that property that is of a military character, under the control of a military authority, and intended to be used for a military purpose is immune from attachment.[48] The court also recognized that there is "'tension between permitting discovery to substantiate [a claim that an FSIA exception applies] and protecting a sovereign's . . . legitimate claim to immunity from discovery.'"[49] However, the court rejected the argument that a limited period of discovery regarding the aircraft's immune status would be inconsistent with FSIA or would overly burden the sovereign.[50]

In *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, Bell Helicopter obtained a default judgment against Iran in a suit alleg-

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[41] *Id.* at 1168–69.

[42] *Id.* at 1170.

[43] *In re* Terrorist Attacks on Sept. 11, 2001, Nos. 03 Civ. 9848(GBD)(FM), 03 MDL 1570(GBD)(FM), 2012 WL 3090979, at *1 (S.D.N.Y. July 30, 2012).

[44] *Id.*

[45] *Id.* at *2.

[46] *Id.*

[47] Aero Union Corp. v. Aircraft Deconstructors Int'l LLC, No. 1:11-CV-00484-JAW, 2012 WL 3679627, at *1 (D. Me. Aug. 24, 2012).

[48] *Id.* at *7.

[49] *Id.* at *8 (quoting Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528, 534 (5th Cir. 1992)).

[50] *Id.*

ing trademark violations in connection with the sale of helicopters that closely resembled Bell helicopters.[51] Iran appeared and moved to vacate the default judgment.[52] The court held that the FSIA commercial activity exception did not apply because Iran's actions took place outside the United States and did not have a "direct effect" in the United States.[53] Notably, the court observed that the Iranian helicopters could not be sold in the United States, and it disagreed that financial harm to Bell flowing from international sales of the Iranian helicopters constituted a "direct effect" in the United States sufficient for application of the commercial activity exception.[54]

In *Sachs v. Republic of Austria*, which is currently set for rehearing en banc, the plaintiff sued the Austrian national railway in California after sustaining personal injuries while attempting to board a moving train in Europe.[55] The Eurail pass that the plaintiff was using had been purchased in California from a Massachusetts-based company called Rail Pass Experts.[56] The issue was whether the FSIA commercial activity exception applied, and the plaintiff argued that the sale of the Eurail pass in California by Rail Pass Experts could be imputed to Austria for the purposes of applying the commercial activity exception.[57] Although it acknowledged that acts may sometimes be imputed to a sovereign, the court held that this was not such a case.[58] "The best [that the plaintiff could] allege [was] that [Austria], as a part-owner along with thirty other owners, wielded some degree of control over Eurail Group and was aware that Eurail Group used U.S. sales agents like Rail Pass Experts."[59] This connection was too attenuated, and analogy to other cases involving the purchase of airline tickets in the United States was unavailing because agency was not a contested issue in those cases.[60]

In *Habyarimana v. Kagame*, two former heads of state perished when an airplane they were traveling in was shot down over

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[51] Bell Helicopter Textron, Inc. v. Islamic Republic of Iran, 892 F. Supp. 2d 219, 221 (D.D.C. 2012).

[52] *Id.* at 222.

[53] *Id.* at 227.

[54] *Id.*

[55] Sachs v. Republic of Austria, 695 F.3d 1021, 1022 (9th Cir. 2012), *vacated and reh'g en banc granted*, 705 F.3d 1112 (9th Cir. 2013).

[56] *Id.*

[57] *Id.* at 1024.

[58] *Id.* at 1025.

[59] *Id.*

[60] *Id.* at 1029.

Rwanda.[61] Their widows filed suit against current Rwandan president Paul Kagame, alleging that he gave the order to attack the plane.[62] The United States then submitted a recommendation of immunity on behalf of President Kagame.[63] The court acknowledged that FSIA has superseded many common law immunity precedents, but it emphasized that for more than a century "American courts have consistently applied the doctrine of sovereign immunity when requested to do so by the executive branch."[64] Accordingly, a "'determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept [it] without reference to the [plaintiff's] underlying claims.'"[65]

III. FEDERAL AVIATION ACT OF 1958

The federal courts have continued to expand the application of the doctrine of implied field preemption to cases involving aviation safety and regulation. Based principally on the Supreme Court decision relating to the need for uniform federal regulation of air commerce in *Burbank v. Lockheed Air Terminal Inc.*[66] and the rule of field preemption espoused in *Rice v. Santa Fe Elevator Corp.*,[67] the federal circuit courts of appeals have recognized that the need for uniformity in aviation safety and regulation requires that federal law apply to determine the standards for aviation safety, operation, and regulation. The First, Second, Third, Fifth, Sixth, Ninth, and Tenth Circuits have expressly concluded that Congress has preempted all or parts of the field of air transportation and aviation safety.[68] Nevertheless, the federal district courts (and, to some extent, the circuit courts) have

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[61] Habyarimana v. Kagame, 696 F.3d 1029, 1030 (10th Cir. 2012).

[62] *Id.* at 1031.

[63] *Id.*

[64] *Id.* at 1032.

[65] *Id.* (quoting Ye v. Zemin, 383 F.3d 620, 626 (7th Cir. 2004)).

[66] 411 U.S. 624 (1973).

[67] 331 U.S. 218 (1947).

[68] *See* Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n, 634 F.3d 206 (2d Cir. 2011); US Airways, Inc. v. O'Donnell, 627 F.3d 1318 (10th Cir. 2010); Elassaad v. Independence Air, Inc., 613 F.3d 119 (3rd Cir. 2010); Martin v. Midwest Express Holdings, Inc., 555 F.3d 806 (9th Cir. 2009); Montalvo v. Spirit Airlines, 508 F.3d 464 (9th Cir. 2007); Greene v. B.F. Goodrich Avionics Sys., Inc., 409 F.3d 784 (6th Cir. 2005), *cert. denied*; Witty v. Delta Air Lines, Inc., 366 F.3d 380 (5th Cir. 2004); Abdullah v. Am. Airlines, Inc., 181 F.3d 363 (3rd Cir. 1999); French v. Pan Am Express, Inc., 869 F.2d 1 (1st Cir. 1989); *see also* Township of Tinicum v. City of Philadelphia, 737 F. Supp. 2d 367 (E.D. Pa. 2010).

continued to reject the doctrine of implied field preemption for aircraft products liability cases. As will be seen below, these efforts to limit federal uniformity in the field of aircraft design and manufacture generally rely on an effort to determine whether Congress *intended* to occupy the field of aircraft design and manufacture, and on the application of a presumption against such preemption because products liability law is an area that has traditionally been occupied by state law. As will be discussed below, however, two 2012 U.S. Supreme Court preemption cases have generally focused on the extent to which federal regulation occupies the field (thus indicating Congress's intent to regulate the field) and have been less concerned with historical and traditional methods for determining Congress's subjective intent, such as considering whether there is a presumption against preemption or whether the field is one which state products liability law has traditionally occupied.[69]

In *Kurns v. Railroad Friction Products Corp.*, the Supreme Court considered the issue of implied field preemption for the regulation of "'the design, the construction[,] and the material of every part of the locomotive and tender and of all appurtenances.'"[70] All of the Justices agreed that the extensive grant of regulatory authority and scope of the federal Locomotive Inspection Act required preemption of any state laws that might impose different standards on the design and manufacture of such equipment.[71] Justice Kagan concurred in the result and based her analysis on a prior Supreme Court decision recognizing the scope of federal preemption under the Locomotive Inspection Act, and she agreed that it applied to preempt state common law tort claims even though the prior decision related to state regulation.[72] Justice Sotomayor, joined by Justice Ginsburg and Justice Breyer, also concurred in the scope of the field of federal preemption but dissented in part on the grounds that a failure-to-warn claim would not constitute state regulation of the product design.[73]

In rendering its decision, the Supreme Court relied upon its prior decision in *Freightliner Corp. v. Myrick*, which analyzed the

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[69] *See* Kurns v. R.R. Friction Prods. Corp., 132 S. Ct. 1261 (2012); Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965 (2012).

[70] *Kurns*, 132 S. Ct. at 1263 (quoting Napier v. Atl. Coast Line R. Co., 272 U.S. 605, 611 (1926)).

[71] *Id.* at 1270; *see* 49 U.S.C. §§ 20701–20703 (2012).

[72] *Kurns*, 132 S. Ct. at 1270 (Kagan, J., concurring).

[73] *Id.* at 1271 (Sotomayor, J., concurring in part and dissenting in part).

issue of congressional intent based upon whether "'the scope of a [federal] statute indicates that Congress intended federal law to occupy a field exclusively.'"[74] To determine the scope of the regulatory authority, the Court looked to the language of the statutory grant of regulatory authority to determine whether it occupied the field of design and manufacture of these products.[75] Satisfied that the statutory language comprehensively encompassed the design and manufacture of these products, all of the Justices agreed that the scope of such regulatory authority precluded common law tort claims alleging defective design and manufacture.[76] Applying this analysis to the Federal Aviation Act would result in a similar determination as to the scope of the grant of regulatory authority to the Federal Aviation Administration (FAA). Finally, and most importantly, both the petitioner and the U.S. Solicitor General argued that the federal regulatory agency had not acted to regulate the "repair and maintenance of locomotives [from which the asbestos exposure claims resulted], rather than the use of locomotives on a railroad line."[77] The Court rejected that argument, having pointed out that the scope of federal preemption (as defined by the earlier Supreme Court decision in which the states had attempted by regulation to require additional equipment not required under then-existing federal regulation) depended upon the *objects of the regulation, not the purpose of the regulation,* and that the asbestos exposure claims "'are directed to the same subject' . . . as the LIA."[78] Thus, even though the common law claims relating to the use of materials containing asbestos in the design and manufacture of railroad equipment were *not* an area in which the Secretary of Transportation had enacted regulations, it was still within the same field; therefore, the common law claims affecting the design and manufacture of the equipment were preempted.[79] Thus, applying this reasoning to the scope of federal regulations enacted by the FAA, whether the FAA has in fact applied or exercised its authority to regulate any particular aspect of aircraft design would not limit the scope of the field preemption, and any state law claim related to the design and

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[74] *Id.* at 1266 (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995)).

[75] *Id.* at 1267–68.

[76] *Id.* at 1270.

[77] *Id.* at 1267.

[78] *Id.* at 1266 (quoting Napier v. Atl. Coast Line R. Co., 272 U.S. 605, 613 (1926)).

[79] *Id.* at 1270.

manufacture of aircraft would still be preempted, provided that Congress had exercised its power to grant that authority to the FAA.[80]

In *National Meat Ass'n v. Harris*, Justice Kagan delivered the opinion for a unanimous Court, finding that the Federal Meat Inspection Act preempts "a California law dictating what slaughterhouses must do with pigs that cannot walk, known in the trade as nonambulatory pigs."[81] Even though the federal statute included a non-preemption provision or savings clause, the Court concluded that the express preemption clause (which defined the scope of the federal regulation) also precluded state regulation of activities that occurred outside the slaughterhouse with regard to animals that were not going to be "turned into meat."[82] The Court expansively interpreted the scope of the federal grant of authority to regulate slaughterhouses and concluded that the savings clause only applied to areas not otherwise within the scope of the express preemption clause, such as workplace safety regulations and building codes applicable to slaughterhouses.[83] This narrow interpretation of the savings clause indicates that the Court is willing to recognize the full scope of federal preemption of a field in which Congress has granted broad regulatory authority to federal agencies.

In *Jones v. Mazda North American Operations*, the Court denied a petition for writ of certiorari to the Fifth Circuit Court of Appeals in a case involving federal preemption of state tort law claims relating to the design of automotive restraint systems.[84] While the reason that the Court denied the petition for certiorari cannot be determined,[85] the fact that the Fifth Circuit decision was not reviewed may indicate the Court's view that not all state common law products liability claims should be preempted in every instance in which a federal regulatory agency may have authority to consider the product design. Thus, the issue of the scope and extent of Congress's grant of regulatory authority

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[80] *See* Medco Energi U.S. v. Sea Robin Pipeline Co., 895 F. Supp. 2d 794, 807 (W.D. La. 2012) (if federal and state statutes are directed to the same physical elements or object, state laws are preempted "however commendable or however different their purpose") (quoting *Kurns*, 132 S.Ct. at 1269 (internal quotations omitted)).

[81] Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 968 (2012); *see* Federal Meat Inspection Act, 21 U.S.C. §§ 601–695 (2012).

[82] *Nat'l Meat Ass'n*, 132 S. Ct. at 973–74.

[83] *Id.* at 974 n.10, 975.

[84] Jones v. Mazda N. Am. Operations, 132 S. Ct. 1555 (2012).

[85] *See id.*

must still be examined as to each field of federal regulation to determine whether that grant of regulatory authority is sufficiently extensive to support the conclusion that Congress intended federal regulation to occupy that field.

Prior to the U.S. Supreme Court decisions in *Kurns* and *National Meat Ass'n*, two Texas decisions, one a federal court decision and the other a Texas state court of appeals decision, rejected federal preemption of the field of aircraft products liability claims. In *Morris v. Cessna Aircraft Co.*, the court rejected a claim of field preemption with regard to the design of the Cessna 208 and its "capacity to operate in 'icing conditions.'"[86] In an extensive opinion, the district court attempted to determine Congress's intent by reviewing the legislative history of the Federal Aviation Act; express preemption under other federal statutes relating to aviation, including the General Aviation Revitalization Act (GARA); and prior U.S. Fifth Circuit Court of Appeals authority finding field preemption "in a specific area of aviation safety."[87] The court also analyzed federal preemption decisions from other federal circuits and concluded that those decisions did not require or support a finding of preemption of products liability claims based on aircraft design.[88] Notably, while extensive, the court's opinion attempted to determine Congress's intent by looking at many factors other than the scope of the federal regulatory authority granted to the FAA.[89] The court minimized that grant of authority by stating that Congress only indicated that the FAA *may* enact regulations—Congress did not require the FAA to issue regulations.[90] Nevertheless, under the Supreme Court's subsequent analysis in *Kurns*, the primary focus should be on the scope of the specific federal regulatory grant to regulate aircraft design, rather than on other factors indicating Congress's intent to preempt other areas of air safety, either expressly or impliedly.

In the second Texas case, *Damian v. Bell Helicopter Textron, Inc.*, the Texas Second Circuit Court of Appeals rejected a claim of federal field preemption, again starting its analysis by determining Congress's intent with regard to its regulation of the field of

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[86] Morris v. Cessna Aircraft Co., 833 F. Supp. 2d 622, 626, 637 (N.D. Tex. 2011).

[87] *Id.* at 630.

[88] *Id.* at 633.

[89] *See id.* at 634.

[90] *Id.* at 633.

aircraft design and airworthiness.[91] Relying on *Monroe v. Cessna Aircraft Co.*,[92] a prior Texas federal district court opinion that was also relied upon by the court in the *Morris* case discussed above, the court concluded that the aircraft certification process "'does not in and of itself constitute a pervasive regulatory scheme evidencing an intent by Congress to preempt the field of aviation safety.'"[93] The Texas court of appeals, similar to the U.S. district court in *Morris*, analyzed Fifth Circuit preemption authority, along with preemption authority in other federal circuits, and concluded that these decisions did not support preemption of state law in defective design claims.[94] Again, the principal focus on the extent of federal regulation in the more recent Supreme Court *Kurns* decision calls the Texas court's analysis into question because the grant of regulatory authority to the FAA is extremely comprehensive—certainly as comprehensive as the grant of authority relating to the design of locomotives in the Locomotive Inspection Act.

IV. AIRLINE DEREGULATION ACT—FEDERAL PREEMPTION

In *Mitchell v. US Airways, Inc.*, a class action was "brought on behalf of skycaps working [for US Airways] at airports throughout the United States."[95] The skycaps "traditionally received most of their compensation from tips given to them by airline passengers."[96] The airline began charging a fee for each bag collected at curbside check-in, and this fee was retained by the airline; thus, the skycaps' compensation began dropping because customers thought the charge was mandatory gratuity.[97] The complaint alleged that the airline: (1) "did not adequately notify passengers that [the] charge was not a gratuity"; and (2) "intentionally and improperly misled the passengers to think the charge was a mandatory tip . . . by requiring the fee to be paid in cash and collected by the [skycaps]."[98]

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[91] Damian v. Bell Helicopter Textron, Inc., 352 S.W.3d 124, 133–34, 137–38 (Tex. App.—Fort Worth 2012, pet. denied).

[92] 417 F. Supp. 2d 824 (E.D. Tex. 2006).

[93] *Damian*, 352 S.W.3d at 135 (quoting Monroe v. Cessna Aircraft Co., 417 F. Supp. 2d 824, 833 (E.D. Tex. 2006)).

[94] *Id.* at 136–38.

[95] Mitchell v. US Airways, Inc., 858 F. Supp. 2d 137, 140–41 (D. Mass. 2012).

[96] *Id.* at 148.

[97] *Id.*

[98] *Id.*

The airline moved to dismiss the claims based on state law, arguing that the preemption clause of the Airline Deregulation Act (ADA) precluded the skycaps' statutory and common law claims for relief.[99] The skycaps argued that their common law claims of tortious interference and unjust enrichment were outside the reach of ADA preemption because the ADA precluded "only positive enactments by the states, not common law damages actions."[100]

After analyzing the legislative history and jurisprudence of the ADA, the court looked at whether the common law claims were "related to a price, route, or service of an air carrier."[101] The court turned to *DiFiore v. American Airlines, Inc.* for guidance; that case involved a class action based on nearly identical facts, except the suit claimed a violation of the Massachusetts Tip Law and sought further relief under the state common law.[102] Because the tortious interference and unjust enrichment claims would have the same prohibited effect as the Massachusetts Tip Law claim in *DiFiore*, the court held that the claims should be precluded to the same extent.[103]

Finally, the skycaps argued "that the claim fit[ ] within the carved-out exception to preemption for breach of contract actions" under the Supreme Court's decision in *American Airlines v. Wolens*.[104] In *Wolens*, "the Supreme Court held that breach of contract claims against airlines [were] not preempted by the [ADA], provided that courts [were] only enforcing [airlines'] self-imposed obligations."[105] The skycaps argued that their quasi-contract claim of unjust enrichment should be allowed to go forward under the *Wolens* exception.[106] The First Circuit noted that a claim for unjust enrichment is, by its very nature, not a breach of contract claim; thus, the unjust enrichment claims were not within the *Wolens* exception.[107] The court therefore held that the skycaps' claims of tortious interference and unjust

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[99] *Id.*

[100] *Id.* at 148–49.

[101] *Id.* at 155 (quoting 49 U.S.C. § 41713(b)(1) (2006)).

[102] *Id.*; *see* DeFiore v. Am. Airlines, Inc., 646 F.3d 81, 84 (1st Cir. 2011).

[103] *Mitchell*, 858 F. Supp. 2d at 157–58; *see DeFiore*, 646 F.3d at 89–90.

[104] *Mitchell*, 858 F. Supp. 2d at 158; *see* Am. Airlines v. Wolens, 513 U.S. 219, 232–33 (1995).

[105] *Mitchell*, 858 F. Supp. 2d at 158 (citing *Wolens*, 513 U.S. at 232–33).

[106] *Id.*

[107] *Id.* at 158–59.

enrichment were preempted by the ADA because the claims were related to a price, route, or service of an air carrier.[108]

In *Miller v. Delta Air Lines, Inc.*, the plaintiff filed suit against the airline for damages resulting from her baggage delay.[109] The plaintiff alleged three claims based on state law: (1) breach of contract, (2) unjust enrichment, and (3) violation of Florida's consumer protection laws.[110] The airline filed a motion to dismiss each of the three counts.[111]

The airline argued that the plaintiff's "claims [were] preempted by the ADA because they impermissibly attempt[ed] to regulate the 'services' of an airline, specifically, the way [the airline] handle[d] checked baggage and passenger claims related to checked baggage."[112]

The court chose to follow *Hodges v. Delta Air Lines, Inc.*[113] in adopting a broad definition of "service" as it was used in the ADA preemption clause.[114] The plaintiff argued that her claims did not deal with "services" provided by the airline but instead arose from the airline's failure to inform customers of their right to reimbursement for delayed baggage.[115] The plaintiff argued that her claims should survive under the exception for "'court enforcement of contract terms set by the parties themselves.'"[116] The plaintiff's claims, however, went far beyond the obligations stipulated by the airline in its contract and rested on allegations that "'relate[d] to the heart of services that an airline provides.'"[117]

The court held that permitting the claim to move forward would sanction regulation of the manner in which airlines advertise their reimbursement services and would interfere with the provision of baggage handling services to their passen-

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[108] *Id.* at 162.

[109] Miller v. Delta Air Lines, Inc., No. 4:11-CV-10099-JLK, 2012 WL 1155138, at *1 (S.D. Fla. Apr. 5, 2012).

[110] *Id.*

[111] *Id.*

[112] *Id.* at *2.

[113] 44 F.3d 334, 336 (5th Cir. 1995).

[114] *Miller*, 2012 WL 1155138, at *2.

[115] *Id.*

[116] *Id.* at *3 (quoting Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 222 (1995)).

[117] *Id.* (quoting Koutsouradis v. Delta Air Lines, Inc., 427 F.3d 1339, 1344 n.2 (11th Cir. 2005)).

gers.[118] Thus, the claims would offend the stated purpose of the ADA and were preempted.[119]

In *Joseph v. JetBlue Airways Corp.*, the plaintiffs filed suit against an airline after certain flights were diverted due to heavy winter storm conditions, and they asserted the following claims under New York state law: unfair and deceptive trade practices, breach of the implied covenant of good faith, false imprisonment, negligence, and negligent infliction of emotional distress.[120] The claims were based on the contention that the airline unlawfully confined the plaintiffs as passengers on the tarmac for a period in excess of seven hours.[121] The airline moved to dismiss the action on the basis that the state law claims were expressly preempted by the ADA and the Federal Aviation Act.[122]

The court went through each of the claims and analyzed whether they were preempted by federal law. First, the deceptive business practices claim sought "to impose obligations upon [the] airline[ ] to provide certain services during ground delays."[123] The court found that the action was preempted by the ADA because enforcing the state law would have the "force and effect of law related to a price, route, or service of an air carrier."[124] Next, the breach of implied covenant claim was found to be "functionally indistinguishable" from the deceptive practice claim and was also found to be expressly preempted by the ADA.[125] Finally, the court analyzed the tort claims, stating that each related to prices, routes, or services because the claims were all premised upon complaints about JetBlue's treatment of the plaintiffs while they were detained on the tarmac.[126]

Thus, the court found that all of the tort claims were expressly preempted by the ADA. Notably, the court also concluded that "Congress has occupied the field of on-ground safety of airplanes and air passengers"; therefore, the claims were also impliedly preempted by the Federal Aviation Act.[127]

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[118] *Id.*

[119] *Id.*

[120] Joseph v. JetBlue Airways Corp., No. 5:11-CV-1387, 2012 WL 1204070, at *1–2 (N.D.N.Y. Apr. 11, 2012).

[121] *Id.* at *1.

[122] *Id.*

[123] *Id.* at *5.

[124] *Id.*

[125] *Id.* at *6.

[126] *Id.* at *7.

[127] *Id.* at *9.

In *Ginsberg v. Northwest, Inc.*, the plaintiff was enrolled in, and eventually expelled from, a frequent flier program offered by the defendant airline.[128] The plaintiff filed suit, asserting claims for "(1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligent misrepresentation; and (4) intentional misrepresentation."[129] The lower court dismissed claims two through four, holding that the ADA preempted them "'because they relate[d] to airline prices and services.'"[130] The plaintiff appealed "the district court's conclusion that the ADA preempt[ed] a claim for breach of the implied covenant of good faith and fair dealing."[131]

The Ninth Circuit first analyzed Congress's intent and the history of enacting the ADA.[132] The court next analyzed existing Supreme Court and Ninth Circuit precedent, particularly focusing on *American Airlines, Inc. v. Wolens* and the carved-out exception to preemption of state common law contract claims.[133]

The Ninth Circuit concluded that a "claim for breach of the implied covenant of good faith and fair dealing does not interfere" with the ADA's deregulation mandate.[134] In *Wolens*, the Supreme Court noted that "state-law-based contract claims would not frustrate the ADA's manifest purpose"[135]: "Because contract law is not at its core 'diverse, nonuniform, and confusing,' we see no large risk of nonuniform adjudication inherent in 'state-court enforcement of the terms of a uniform agreement prepared by an airline and entered into with its passengers nationwide.'"[136] The airline was free to invest in a frequent flier program, but it also had to comply with its contractual obligations pursuant to the covenant of good faith and fair dealing.[137]

Finally, the district court held that the breach of the covenant of good faith and fair dealing did not relate to either prices or services under the ADA.[138] The Ninth Circuit concluded that the district court (1) used an "overly broad definition" of what

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128 Ginsberg v. Nw., Inc., 695 F.3d 873, 874–75 (9th Cir. 2012).

129 *Id.* at 875.

130 *Id.*

131 *Id.*

132 *Id.* at 875–76.

133 *Id.* at 877–79; *see* Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 222 (1995).

134 *Ginsberg*, 695 F.3d at 880.

135 *Id.*

136 *Wolens*, 513 U.S. at 233 n.8 (internal citation and alteration omitted).

137 *Ginsberg*, 695 F.3d at 880.

138 *Id.* at 880–81.

related to "prices" and (2) interpreted the "relating to" language in a manner inconsistent with the ADA.[139]

Thus, the Ninth Circuit stated that nothing in the ADA's language, history, or regulations suggested that Congress intended to displace state common law contract claims that did not affect deregulation in more than a "peripheral . . . manner."[140] Thus, the Ninth Circuit concluded that "a claim for breach of the implied covenant of good faith and fair dealing [was] not preempted by the ADA."[141]

In *Newman v. Spirit Airlines, Inc.*, the plaintiff sued an airline under state law for consumer fraud, breach of contract, and unjust enrichment based on the airline's decision to charge a two-dollar fee on all airline purchases.[142] The airline removed the case to federal court and moved to dismiss it as preempted by the ADA.[143] The court analyzed ADA preemption jurisprudence and noted that a claim was preempted if it "(1) relate[d] to airline prices, routes, or services; and (2) [was derived] from the enactment or enforcement of state law."[144]

The plaintiff's complaint failed to identify any contractual obligation that the airline breached.[145] Relying on *Ginsberg v. Northwest, Inc.* (discussed above), the plaintiff argued that she could "state a claim for breach of the implied duty of good faith and fair dealing," as such claims were not preempted by the ADA.[146] The court, however, declined to follow *Ginsberg* to the extent "that a claim for breach of the implied covenant of good faith and fair dealing [was] *never* preempted by the ADA."[147]

"[U]nder Illinois law[,] there is no independent contractual claim for breach of the covenant"; thus, "any attempt to enforce the implied covenant . . . [was] an attempt to enforce state law, not a voluntary undertaking."[148] The court held that a claim for breach of the implied covenant of good faith can be preempted

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139 *Id.* at 881.

140 *Id.* (citation omitted).

141 *Id.* at 881–82.

142 Newman v. Spirit Airlines, Inc., No. 12-C-2897, 2012 WL 3134422, at *1 (N.D. Ill. July 27, 2012).

143 *Id.*

144 *Id.* at *2 (citation omitted).

145 *Id.* at *3.

146 *Id.*

147 *Id.* at *4 (emphasis added).

148 *Id.*

by the ADA.[149] Because the claim related to the price of the ticket, the claim was preempted by the ADA.[150]

In *Holmes v. United Airlines, Inc.*, the plaintiff sued the airline for negligence after she slipped and fell from a metal ladder, causing several injuries.[151] The airline argued that the plaintiff's state law claims were preempted by the Federal Aviation Act and the ADA.[152] The court analyzed ADA jurisprudence and held that "[g]iven the nature of the negligence claim, . . . it [did] not relate to airplane prices, routes[,] and services."[153] A negligence claim based on a slip and fall is not related to airlines' economic decisions, contractual decisions, prices, or issues concerning deplaning.[154] Courts have typically recognized that personal injury negligence claims against airlines are governed by state law.[155] Thus, the court found that "Congress did not expressly preempt personal injury negligence claims against airlines regarding the use of metal ladders to deplane."[156]

The court also analyzed whether there was implied or "conflict" preemption.[157] "Conflict preemption occurs 'where it is impossible for a private party to comply with both state and federal requirements or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[158] The court held that conflict preemption was inapplicable, as the state common law negligence claim did not stand as an obstacle to the objectives of Congress in enacting the Federal Aviation Act and the ADA.[159] The court also held that "Congress did not intend the [Federal Aviation Act] to occupy the field of torts exclusively"; thus, complete preemption did not apply either.[160]

In *Hamilton v. United Airlines, Inc.*, the plaintiff argued that the airline had no lawful reason for his termination and brought state law claims, including one under the state whistleblower act;

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149 *Id.*

150 *Id.*

151 Holmes v. United Airlines, Inc., No. 10-C-8085, 2012 WL 245136, at *1 (N.D. Ill. Jan. 25, 2012) (mem. op.).

152 *Id.* at *3.

153 *Id.* at *4.

154 *Id.* at *5.

155 *Id.*

156 *Id.*

157 *Id.* at *5–6.

158 *Id.* at *5.

159 *Id.* at *6.

160 *Id.* at *5–6.

the case was then removed to federal court.[161] The plaintiff argued that removal was improper because the state law claims were not preempted, as they were not related to the airline's prices, routes, or services.[162] Further, the plaintiff argued that the Whistleblower Protection Program (WPP) amendment to the ADA did not expand the statute's preemptive force to include all whistleblowing claims relating to air safety.[163]

The airline argued that the ADA expressly preempted the plaintiff's state law claims because (1) they related to the airline's safety obligations, rates, routes, and services; and (2) resolution of the claims required examination of the airline's policies with regard to federal law and regulations.[164] Further, the airline argued that the WPP amendment bolstered the inference for preemption and provided an exclusive federal remedy for the plaintiff's claims.[165]

The court held that the claims were not preempted by the ADA's preemption language.[166] After analyzing existing ADA jurisprudence, the court held that the claims were too tenuously related to any price, route, or service provided by the airline.[167] Next, the court held that the legislative record did not indicate a "clear and manifest" intent to preempt all state laws as they related to air safety whistleblowing through the WPP.[168] Thus, the court held that the WPP did not expand the ADA's preemptive scope.[169]

V. FEDERAL PREEMPTION—OTHER FEDERAL STATUTES

A. Air Carrier Access Act of 1986—Discrimination in Boarding

In *Edick v. Allegiant Air, LLC*, the plaintiff's husband fell and hit his head as he was entering the airport terminal at McCarran

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161 Hamilton v. United Airlines, Inc., No. 12-C-6821, 2012 WL 6642489, at *1 (N.D. Ill. Dec. 19, 2012).

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.* at *5.

167 *Id.*

168 *Id.* at *8.

169 *Id.* at *9.

International Airport.[170] The airline moved for summary judgment, arguing that all of the plaintiff's claims were preempted by federal law.[171] The plaintiff's claims focused on two alleged breaches of duty by the airline: (1) the airline's failure to provide wheelchair access; and (2) the airline's failure to accept the plaintiff's check-in baggage.[172]

The airline argued that the plaintiff's wheelchair-related claim was preempted by the Air Carrier Access Act of 1986 (ACAA).[173] Federal regulations require that airlines provide wheelchair assistance for passengers when boarding or deplaning,[174] when traveling between terminals to reach a connecting flight,[175] and when moving from the terminal entrance or vehicle drop-off point to the gate.[176] Here, the incident involved the failure to provide wheelchair assistance from a parking garage to the check-in counter.[177] "Pursuant to the ACAA, an air carrier's obligation[ ] to provide wheelchair assistance [does] not extend beyond the areas of the terminal . . . it controls."[178] Because the airline did not control the parking area of the airport, the court found that the plaintiff's wheelchair assistance-related claims were preempted by the ACAA.[179] The plaintiff's claims about the airline's failure to check in the plaintiff's baggage were also preempted by federal law.[180] Thus, the court granted summary judgment on both claims.[181]

In *O'Brien v. City of Phoenix*, the plaintiff, who was legally blind, alleged that she fell and was injured when she stepped off of the airplane onto the jetway because the jetway was improperly aligned with the airplane.[182] The plaintiff alleged state law claims of premises liability and negligence.[183] The defendants removed the action to federal court on the basis of federal-question juris-

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170 Edick v. Allegiant Air, LLC, No. 2:11-CV-259, 2012 WL 1463580, at *1 (D. Nev. Apr. 27, 2012).

171 *Id.* at *2.

172 *Id.*

173 *Id.*

174 14 C.F.R. § 382.95(a) (2012).

175 *Id.* § 382.91(a).

176 *Id.* § 382.91(b).

177 *Edick*, 2012 WL 1463580, at *2.

178 *Id.* at *3.

179 *Id.*

180 *Id.*

181 *Id.*

182 O'Brien v. City of Phoenix, No. CV-12-1334-PHX-FJM, 2012 WL 4762465, at *1 (D. Ariz. Oct. 5, 2012).

183 *Id.*

diction, asserting that the state law claims were preempted by the ACAA, which the defendants argued were the rules that exclusively govern airline standards for assisting passengers with disabilities.[184] The plaintiff sought a remand, arguing that her state law claims were not preempted by federal law.[185]

The court stated that the ACAA does not expressly provide a private cause of action and that no private right of action should be implied.[186] Because the court concluded that there was no private right of action under the ACAA, the plaintiff's claims could not be asserted in federal court.[187] The court remanded the case to state court to determine whether the claims were preempted.[188] To the extent that the state court determined the claims were preempted, the plaintiff's remedy was with the Department of Transportation.[189] To the extent that the state court decided the claims were not preempted, the claims were properly before the state court.[190]

In *Compass Airlines, LLC v. Montana Department of Labor & Industry, Hearings Bureau*, a flight attendant employed by Compass Airlines denied boarding to a passenger with a disability.[191] The passenger was preparing to board a flight when the flight attendant stopped him because she thought he was bringing a prohibited item onto the flight.[192] The flight attendant was wrong on several accounts, but her actions were corrected by the Complaint Resolution Officer.[193] The passenger was told he could board the flight, but was upset and refused to do so.[194] The passenger then filed a complaint with the U.S. Department of Transportation, alleging a violation of the ACAA.[195] The passenger also filed a complaint with the Montana Human Rights Bureau, alleging a violation of the Montana Human Rights Act based on the same incident.[196]

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184 *Id.*

185 *Id.*

186 *Id.*

187 *Id.* at *2.

188 *Id.*

189 *Id.*

190 *Id.*

191 Compass Airlines, LLC v. Mont. Dep't of Labor & Indus., Hearings Bureau, 914 F. Supp. 2d 1170, 1172 (D. Mont. 2012).

192 *Id.*

193 *Id.*

194 *Id.*

195 *Id.* at 1172–73.

196 *Id.* at 1173.

Compass Airlines sought a declaratory judgment that the ACAA completely preempted the field raised by the underlying claims and displaced all state law claims that could be sought.[197] In analyzing the plaintiff's motion for an expedited preliminary injunction, the court analyzed preemption under the ACAA.[198] The court noted that the Ninth Circuit had not addressed whether the ACAA impliedly preempts state law claims, but district courts within the Ninth Circuit had so found when pervasive federal regulations govern the controversy.[199] The passenger argued that state law claims could coexist with the ACAA as long as the state law claim used the same standard of care as that required by the ACAA.[200]

The court held that it appeared likely that a court would ultimately find that the passenger's state law claim for disability discrimination was preempted by the ACAA.[201] It also held that it was likely that a court would ultimately find that there was no implied right of action for violations of the ACAA's regulations as to the utilization of electronic respiratory devices by passengers during flights.[202] Finally, the court held that it appeared likely that it would find that none of the passenger's claims survive preemption.[203]

In *Segalman v. Southwest Airlines*, a passenger with cerebral palsy filed suit after his mechanized wheelchair was stored improperly and lost power during his flight, causing him to have to use an uncomfortable manual wheelchair.[204] The airline argued that the plaintiff's claims of violation of state disability laws and common law negligence were preempted by the ACAA.[205] The court held that because the plaintiff's claims were premised on a violation of the airline's duty to properly stow and transport the wheelchair, the claims were subject to field preemption by the ACAA.[206] The ACAA provides explicit instructions regarding the duties of an air carrier with respect to the stowage and transpor-

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197 *Id.* at 1174.

198 *See id.* at 1175–79.

199 *Id.* at 1175.

200 *Id.*

201 *Id.* at 1179.

202 *Id.*

203 *Id.*

204 Segalman v. Sw. Airlines, 913 F. Supp. 2d 941, 944 (E.D. Cal. 2012).

205 *Id.* at 948.

206 *Id.* at 950.

tation of wheelchairs.[207] Thus, the plaintiff's state law claims were held to be preempted by the ACAA.[208]

B. FAA Authorization Act of 1994

In *S.C. Johnson & Son, Inc. v. Transport Corp. of America*, a manufacturer raised a number of state law claims against several carriers, alleging that they had conspired with a former employee of the manufacturer to exchange bribes for favorable treatment.[209] The U.S. district court dismissed the action as preempted by federal law pursuant to 49 U.S.C. § 14501(c)(1) of the Federal Aviation Administration Authorization Act of 1994 (FAAAA).[210] The manufacturer appealed.[211]

The Seventh Circuit relied on three Supreme Court decisions to provide an outline of the approach to preemption[212]: *Morales v. Trans World Airlines, Inc.*;[213] *American Airlines, Inc. v. Wolens*;[214] and *Rowe v. New Hampshire Motor Transport Ass'n.*[215] The Seventh Circuit also provided illustrative cases where either the ADA or the FAAAA had concluded that there was no preemption.[216]

The manufacturer argued that its tort claims sought civil damages for the carriers' alleged criminal conduct: bribery, conspiracy, fraud, and racketeering.[217] The carriers argued that all of the allegations were complaints that the manufacturer paid too much for its services, which was an argument about rates and service.[218] The Seventh Circuit decided to analyze each of the claims individually.[219]

The court held that two of the manufacturer's theories, fraudulent misrepresentation by omission and conspiracy to commit fraud, related sufficiently to rates, routes, or services such that they must be rejected as a matter of law under the FAAAA pre-

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207 *Id.*

208 *Id.*

209 S.C. Johnson & Son, Inc. v. Transp. Corp. of Am., 697 F.3d 544, 545 (7th Cir. 2012).

210 *Id.* at 545–46.

211 *Id.* at 547.

212 *Id.* at 549.

213 504 U.S. 374 (1992).

214 513 U.S. 219 (1995).

215 552 U.S. 364 (2008).

216 *S.C. Johnson*, 697 F.3d at 555.

217 *Id.* at 556.

218 *Id.* at 557.

219 *Id.*

emption rule.[220] Each of these claims sought to substitute a state policy, embodied in law, for the agreements that the party had reached.[221] Finding these claims preempted, the court stated:

> State consumer protection laws often contain well-meaning but widely varying paternalistic provisions designed to protect consumers from the rigors of the market. Congress decided, however, in both the ADA and the FAAAA that it did not want (nor did it want the states) to displace the market in this way.[222]

Next, the Seventh Circuit analyzed the two remaining claims of criminal conspiracy under Wisconsin's bribery statute and violation of Wisconsin's state equivalent to the federal racketeering statute.[223] The court observed that, for FAAAA purposes, Wisconsin's law forbidding bribery should not be characterized in the same manner as consumer fraud and deceptive practices.[224] While the injuries incurred would have had a tangential effect on costs, these offenses were the kind the Supreme Court has held to fall on the "'non-preemption' side of the line."[225] Additionally, the state law racketeering claims related too tangentially to rates, routes, and services.[226] Accordingly, the court found that the FAAAA did not preempt the state bribery and racketeering claims.[227]

Thus, the Seventh Circuit held that the district court correctly found that the manufacturer's claims asserting fraudulent misrepresentation by omission and conspiracy to commit fraud were preempted by the FAAAA, but the Seventh Circuit reversed and remanded the district court's decision on the state bribery and racketeering claims.[228]

C. 49 U.S.C. § 44112

In *Vreeland v. Ferrer*, the Florida Supreme Court narrowly applied the scope of express federal preemption under 49 U.S.C. § 44112, limiting it to preemption of claims against owners of aircraft, not against those in actual possession or control of the aircraft, and only in cases in which an aircraft caused injury or

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220 *Id.*
221 *Id.*
222 *Id.*
223 *Id.* at 557–58.
224 *Id.* at 559–60.
225 *Id.* at 560.
226 *Id.* at 560–61.
227 *Id.*
228 *Id.* at 561.

damage to persons or property on the ground.[229] The Florida Supreme Court rejected the argument that the federal statute should protect owners (such as lessors) not in actual possession or control of the aircraft, even as to injuries to persons within the aircraft that occurred upon collision with the ground.[230] The U.S. Supreme Court denied the petition for certiorari, in which amicus National Aircraft Finance Association argued, among other things, for field preemption based on: (1) federal aviation regulations that impose the responsibility for air safety only on aircraft operators (and not on aircraft owners or lessors); and (2) the legislative history of the statute that indicated that Congress did not intend to impose federal duties for air safety upon owners without actual possession or control of the aircraft.[231] The U.S. District Court for the Southern District of Florida followed the Florida Supreme Court's *Vreeland* decision in *In re Air Crash Near Rio Grande Puerto Rico on December 3, 2008.*[232]

In *In re Hudson River Mid-Air Collision*, the U.S. District Court for the District of New Jersey also considered the issue of preemption under 49 U.S.C. § 44112 for claims against the owner of a Piper aircraft that was involved in a mid-air collision with a Eurocopter over the Hudson River.[233] As in *Vreeland*, the plaintiffs' decedents were passengers onboard the Eurocopter and the Piper aircraft, rather than persons on the ground.[234] Nevertheless, the district court held that there were genuine issues of material fact as to whether the owner exercised actual control over the operation of the aircraft; therefore, the court was not required to decide the preemption issue as to persons aboard the aircraft because if such control was present, then neither the dangerous instrumentality nor the negligent entrustment doctrines, under which ownership liability was asserted, would be preempted under 49 U.S.C. § 44112.[235]

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[229] Vreeland v. Ferrer, 71 So. 3d 70, 83–84 (Fla. 2011), *cert. denied.*

[230] *Id.* at 84.

[231] Aerolease of Am., Inc. v. Vreeland, 132 S. Ct. 1557 (2012), *denying cert. to* 71 So. 3d 70 (Fla. 2011); Brief for Nat'l Aircraft Fin. Ass'n as Amicus Curiae in Support of Petitioner, at 17–19, Aerolease of Am., Inc. v. Vreeland, 132 S. Ct. 1157 (2012) (No. 11-728). Copies of the briefs are available at www.stitesaviationupdates.com.

[232] No. 11-md-02246-KAM, 2012 WL 760885, at *14–17 (S.D. Fla. Mar. 7, 2012).

[233] *In re* Hudson River Mid-Air Collision on Aug. 8, 2009, No. 09-06142, 2012 WL 646005, at *1 (D.N.J. Feb. 28, 2012).

[234] *Id.* at *3.

[235] *Id.* at *4.

VI. FEDERAL TORT CLAIMS ACT

Generally, in the absence of a waiver, federal courts lack jurisdiction to hear claims against the United States because of sovereign immunity.[236] The Federal Tort Claims Act (FTCA), however, waives the government's sovereign immunity for

> personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[237]

The FTCA excludes independent contractors from its definition of "employee."[238] Thus, under the FTCA, a determination of whether an individual may be considered a federal employee depends upon the amount of control the federal government has over the individual's physical performance.[239] In addition, the government may be shielded under the FTCA's discretionary function exception.[240] This exception insulates the government from liability for claims based upon a government employee's acts or omissions in performing a discretionary function or duty that involves an element of judgment or choice, as long as the judgment is of the kind that the discretionary function exception was designed to shield.[241] If the FTCA does not apply to an action so as to waive the government's sovereign immunity, then the claims against the government must be dismissed for lack of subject-matter jurisdiction.[242]

To successfully maintain an action against the United States, a claimant must first satisfy the statutory notice requirement of 28 U.S.C. § 2675(a).[243] The failure to file an administrative claim is grounds for dismissal, as the "filing of an administrative claim is a jurisdictional requirement and an absolute prerequisite to

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[236] FDIC v. Meyer, 510 U.S. 471, 475 (1994).

[237] 28 U.S.C. § 1346(b)(1) (2006).

[238] *Id.* § 2671.

[239] *See* Knudsen v. United States, 254 F.3d 747, 750 (8th Cir. 2001).

[240] 28 U.S.C. § 2680(a).

[241] United States v. Gaubert, 499 U.S. 315, 322–23 (1991).

[242] *See* FDIC v. Meyer, 510 U.S. 471, 475 (1994).

[243] *See* 28 U.S.C. § 2675(a) (providing that an "action shall not be instituted upon a claim against the United States" for damages "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied.").

maintaining a civil action against the government under the FTCA."[244] Courts have held that the purpose of the notice requirement is to "ease court congestion and avoid unnecessary litigation, while making it possible for the [g]overnment to expedite the fair settlement of tort claims asserted against the United States."[245]

In *Turturro v. United States*, the court denied the United States' motion to dismiss the case for lack of subject-matter jurisdiction, finding that the Form 95s filed by the plaintiffs properly put the United States on notice of the claims.[246] *Turturro* stems from the death of a flight instructor and his student when they lost control and crashed their small aircraft into a parking lot while practicing touch-and-go landings at the Northeast Philadelphia Airport on May 22, 2008.[247] Following the accident, the two estates filed separate Form 95s with the FAA, alleging that the FAA controllers failed to give the small aircraft sufficient warning about and separation from a helicopter that had departed just prior to the small aircraft.[248] The plaintiffs alleged that the large helicopter generated wake vortices, rotor downwash, and wake turbulence.[249] After the FAA denied both administrative claims, the plaintiffs filed lawsuits, took depositions, and then filed second amended complaints.[250] The United States then moved to dismiss the second amended complaints for lack of subject-matter jurisdiction, arguing that most of the substantive allegations in the second amended complaints were new and were not presented to the FAA for review in the Form 95s.[251]

After noting that the Third Circuit recognized "minimal notice" to satisfy the notice requirement, the court addressed the motion of the United States.[252] The court discussed the allegations found in the plaintiffs' second amended complaints and noted that their Form 95s, coupled with their experts' report,

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244 Valenzuela v. Thrifty Rent-A-Car, No. CIV. A. 94-7752, 1995 WL 708109, at *3 (E.D. Pa. Nov. 20, 1995).

245 *See, e.g.*, Tucker v. U.S. Postal Service, 676 F.2d 954, 958 (3d Cir. 1982).

246 Turturro v. United States, Nos. 10-2460, 10-3063, 2012 WL 1758154, at *8 (E.D. Pa. May 17, 2012).

247 *Id.* at *1.

248 *Id.*

249 *Id.*

250 *Id.* at *2.

251 *Id.*

252 *Id.* at *3.

properly put the United States on notice of the claims included in the second amended complaints.[253]

A different result occurred in *Kodar, LLC v. United States.*[254] The *Kodar* "litigation arose out of the June 6, 2008 collision between two private airplanes, a 1986 Beechcraft A36 Bonanza . . . and a Piper PA-30 Twin Comanche, . . . at North Central State Airport in Smithfield, Rhode Island."[255] The pilot of the Bonanza claimed "that he was given clearance from traffic control personnel to depart from Runway 5," and that "traffic control personnel failed to advise him that the Comanche was in the process of approaching and landing" on Runway 5.[256] While the pilot and owners of the Bonanza filed administrative claims against the FAA in a timely manner, the pilot of the Comanche did not file a claim against the FAA until September 16, 2011, when he filed an answer to the Bonzanza pilot's complaint and also filed a cross-claim against the FAA.[257] The FAA sought to dismiss the Comanche pilot's cross-claim against it, pleading that no claim had been presented to the FAA, and that the Comanche pilot had exceeded the two-year statute of limitations under the FTCA.[258] In response, the Comanche pilot argued that the requirement of an administrative complaint did not apply to cross-claims, and therefore his claim should not be dismissed.[259] The FAA countered that "[w]hile [s]ection 2675(a) does not apply to . . . cross-claims, . . . that provision does not waive the FTCA's two-year statute of limitations."[260]

The court held that the Comanche pilot's "cross-claim against the FAA [was] in the nature of a direct complaint pursuant to the FTCA."[261] Therefore, the cross-claim did not come within the section 2675(a) exception requiring "the filing of a timely administrative claim for [the] [c]ourt to have jurisdiction over the complaint."[262] The court then granted the FAA's motion for dismissal of the Comanche pilot's claims for personal injury.[263]

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253 *Id.* at *7.

254 879 F. Supp. 2d. 218 (D.R.I. 2012).

255 *Id.* at 219.

256 *Id.* at 220.

257 *Id.* at 221.

258 *Id.*; *see* 28 U.S.C. § 2401(b) (2006).

259 *Kodar*, 879 F. Supp. 2d at 224.

260 *Id.* at 223.

261 *Id.* at 228.

262 *Id.*

263 *Id.* The Comanche pilot's claims for contribution and indemnity were not challenged by the FAA, as the FTCA statute of limitations with respect to those

As previously discussed, claims against the United States under the FTCA must be presented to the United States within two years after those claims accrue.[264] In *Ressler v. United States*, the federal court held that claims received by the FAA two years and eight days after the claims had accrued were untimely, and were therefore dismissed.[265] *Ressler* stemmed from the "crash of a commercial airliner in Denver, Colorado, on December 20, 2008."[266] In *Ressler*, the McLean plaintiffs "allege[d] that the negligence of the United States, acting [through the FAA], caused the crash and the plaintiffs' injuries" because the FAA "failed to provide proper wind information to the pilots of the airplane."[267] Two years after the crash, on December 20, 2010, the plaintiffs sent their administrative claims to the FAA.[268] "The FAA received the claims on December 28, 2010."[269]

Defendant United States moved to dismiss the McLean plaintiffs' claims as untimely; in their response, the McLean plaintiffs argued that their claims did not accrue until April 20, 2009, the date that "the National Transportation Safety Board (NTSB) released its first factual report concerning the crash."[270] The McLean plaintiffs argued that "they first learned critical facts showing the culpability of the United States" at that time.[271]

Citing the pertinent case law, the federal court concluded that "the McLean plaintiffs' claims accrued on the day of the crash, December 20, 2008."[272] Since their "administrative claims were not presented to the FAA until December 28, 2010, more than two years after their claims accrued," the McLean plaintiffs' FTCA claims were "'forever barred'" because they were not "'presented in writing to the appropriate [f]ederal agency within two years after'" the accrual of such claims.[273]

While reiterating the established rule that the federal courts have exclusive jurisdiction over FTCA claims, the court in *Snider*

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claims "begins to run from the date of payment on judgment, not the date of injury." *Id.* at 223 n.4.

264 28 U.S.C. § 2401(b).

265 Ressler v. United States, No. 10-CV-03050-REB-BNB, 2012 WL 4328662, at *3 (D. Colo. Sept. 20, 2012).

266 *Id.* at *1.

267 *Id.*

268 *Id.* at *2.

269 *Id.*

270 *Id.*

271 *Id.*

272 *Id.*

273 *Id.* at *3 (quoting 28 U.S.C. § 2401(b) (2006)).

v. Sterling Airways highlighted the often unanticipated and unpredictable procedural pitfalls of removal to federal court.[274] The *Snider* case arose out of a "crash of a Cessna T210L airplane during an attempted landing at William T. Piper Memorial Airport in Loch Haven, Pennsylvania."[275] The airplane's pilot and two passengers, "both employees of the United States Department of Agriculture, Forest Service," died in the crash.[276] The widow of one of the passengers brought an action in the Court of Common Pleas of Philadelphia County for damages, asserting both products liability and tort theories against Teledyne and Sterling Airways, Inc.[277] Before service of the complaint on any of the defendants, Teledyne removed the case to federal court.[278] Teledyne then answered the complaint, filed a cross-claim against Sterling, and "filed a third-party complaint against the estate of the pilot and the [Forest] Service."[279]

The plaintiffs moved to remand the case to state court, arguing that even though Teledyne's removal had preceded service on any of the defendants, the court should nevertheless consider the presence of the unserved forum defendants.[280] While vigorously defending the removal itself, Teledyne also countered that even if removal was improper, the presence of the Forest Service precluded remand to state court.[281] Acknowledging the split of authority, the federal court concluded that it could "not ignore the presence of unserved forum defendants if none of the defendants [were] formally served before removal."[282] Then, citing the long-standing rule that a court "evaluate[s] the propriety of removal based on the state of the case at the time" that the notice of removal was filed, the court concluded that Teledyne's later post-removal third-party complaint against the Forest Service did not affect the propriety of the removal.[283] The court further held that the presence of the third-party FTCA claims at the time of the motion to remand did not

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[274] *See* Snider v. Sterling Airways, Inc., No. 12-CV-3054, 2013 WL 159813 (E.D. Pa. Jan. 15, 2013).

[275] *Id.* at *1.

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] *Id.*

[280] *Id.* at *1–2. This aspect of the case is discussed in Part VIII.B.

[281] *Id.* at *2.

[282] *Id.*

[283] *Id.*

independently preclude remand.[284] Finally, responding to Teledyne's argument that if Teledyne had asserted third-party claims in state court, the United States could have subsequently removed the matter to federal court, the court rejected the argument as a speculative event "which ha[d] not occurred and may never occur."[285]

VII. PRODUCTS LIABILITY

A. Flight Training

The level of sophistication of modern aircraft has resulted in many manufacturers, sellers, lessors, and their insurers either requiring or offering specific training for many aircraft.[286] The sophistication of these aircraft promises enhanced safety to pilots and passengers, as well as improved operational capability; however, operation of the aircraft and their sophisticated systems requires higher levels of pilot training and proficiency.[287] While most of these cases are not true products liability cases in the sense that the manufacturer or training facility has a legal duty to provide this training, the training nevertheless is provided by contract, resulting in potential claims for breach of contract or "educational malpractice." Thus, these training cases are included in this section on products liability even though they are not based on the principles of strict liability in tort that generally provide the basis for most products liability cases.

In *Younan v. Rolls Royce Corp.*, the U.S. District Court for the Southern District of California considered a motion for summary judgment filed by MD Helicopters, Inc. (MDHI) relating to the crash of a 1994 MD600N helicopter manufactured by MDHI's predecessor, McDonnell Douglas Helicopter Systems (MDHS).[288] Following the 1997 merger of the Boeing Company and McDonnell Douglas, MDHI purchased the MD600N product line in 1999 through an asset purchase agreement and became the Type Certificate (TC) holder for the MD600N model helicopter.[289] As part of the asset purchase agreement, MDHI

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284 *Id.*

285 *Id.* at *5 n.11.

286 *See Training*, Airbus, www.airbus.com/support/training (last visited Aug. 23, 2013).

287 *See Leveraging New Technology to Enhance Safety*, Boeing, www.boeing.com/boeing/commercial/safety/technology.page (last visited Aug. 23, 2013).

288 Younan v. Rolls-Royce Corp., No. 09-CV-2136-WQH-BGS, 2012 WL 2060869, at *1 (S.D. Cal. June 6, 2013).

289 *Id.* at *2.

expressly assumed all liabilities for post-sale causes of action involving pre-asset sale MD600N helicopters "'based on notices to customers, such as contained in maintenance manuals, service notices, etc.'"[290]

The helicopter involved in the accident had been purchased by the Border Patrol from Boeing in 1998.[291] The accident occurred in 2009 during a night flight near San Clemente, California, when, as a result of an engine failure, the crew attempted an autorotation and landed the helicopter in shallow water near the beach.[292] At the time of the autorotation, the helicopter was flying at 3,834 pounds gross weight and 1,500 feet density altitude.[293] The pilot performed what he considered to be a "textbook autorotation," landing in one spot without any slipping or sliding, and well within the "FAA-approved limitations for handling quality and autorotation performance."[294] Nevertheless, the helicopter was substantially damaged and both crew members sustained injuries as a result of the landing.[295]

Following the purchase of the MD600N model helicopters by the federal government, the General Accounting Office (GAO) performed a study of several incidents related to autorotation in the MD600N helicopter.[296] The GAO concluded that "'the manner in which the MD600N handles could make successful autorotations more difficult, in part, because it descends faster than other helicopters . . . . [B]ecause it is heavier and has a higher descent rate, there is little room for error at the bottom of the descent.'"[297] As a result, following the implementation of certain design changes by MDHI to the helicopter, MDHI contracted with U.S. Customs and Border Protection (CPB) in 2002 "to provide recurrent ground school and flight training in the MD600N model aircraft to CBP pilots"—including the pilot of the accident aircraft.[298] The pilot, plaintiff Younan, received flight training in an F4 model helicopter in 2008 but claimed that the "F4 hand[l]ing qualities, performance, and autorota-

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290 *Id.*

291 *Id.*

292 *Id.* at *3.

293 *Id.*

294 *Id.* at *4.

295 *Id.* at *3–4.

296 *Id.* at *2.

297 *Id.*

298 *Id.* at *3.

tional characteristics are vastly different from an MD600N," and that the failure to

> properly train [him] in the difference between a true emergency autorotation at an operational weight of a CBP aircraft (3900 lbs) and their "variant" trainer—the F4—at 3100 pounds, combined with the very poor autorotation recovery capacity of the 600N were the reasons [for the] crash landing [that] destroyed the aircraft and caused the injuries to the flight crew.[299]

The district court denied the summary judgment motion, applying "professional negligence" standards to the flight training claims.[300] The district court did not consider whether the claims presented were "educational malpractice" claims, but concluded that the existence of expert testimony regarding the adequacy of the training was sufficient to preclude summary judgment.[301] The district court also found that the successor TC holder had an ongoing duty to warn and that the liability for such training fell "within the causes of action for which MDHI [had] assumed liability from MDHS/Boeing in the 1999 asset transfer."[302] Next, in addressing a "sophisticated user defense," the district court recognized that the plaintiff was a highly trained helicopter pilot, but the court nevertheless held that the plaintiff had "come forward with evidence of a genuine dispute as to whether [he] was a sophisticated user of the MD600N model helicopter."[303] Finally, the district court held that summary judgment would be granted as to the strict liability claims because "California law does not recognize a strict liability claim for defective training."[304]

In *Glorvigen v. Cirrus Design Corp.*, the Supreme Court of Minnesota affirmed, as a matter of law, a judgment in favor of Cirrus Design Corp. as to the claims of the trustees of the next-of-kin of the pilot and passenger of a Cirrus SR22 aircraft with respect to an "emergency situation" involving inadvertent flight by a non-instrument-rated pilot into instrument meterological conditions and the use of the SR22 autopilot.[305] The plaintiffs claimed that the pilot, Mr. Kosak, had not received a lesson relating to recovery from such situations that was to be provided to him under "a

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299 *Id.* at *4.
300 *Id.* at *6–7.
301 *Id.*
302 *Id.* at *7.
303 *Id.* at *8.
304 *Id.* at *10.
305 Glorvigen v. Cirrus Design Corp., 816 N.W.2d 572, 575 (Minn. 2012).

training program for new [Cirrus SR22] owners" to assist them in transitioning to the SR22.[306] At trial, the jury found Cirrus 37.5% negligent, University of North Dakota Aerospace Foundation (UNDAF) 37.5% negligent, and pilot Prokop 25% negligent.[307] In a decision reported extensively in prior articles, the Minnesota Court of Appeals reversed the trial court's denial of a motion for judgment as a matter of law on the grounds that (1) the manufacturer did not have a duty to provide transition flight training, and (2) the negligence claim was barred under Minnesota law by the "educational malpractice doctrine."[308]

The Minnesota Supreme Court recognized that, regardless of whether the tort claim was characterized as a products liability claim or a negligence claim, Cirrus, as a manufacturer or supplier, did not have a duty to warn that required Cirrus to provide the lesson at issue.[309] The court noted that there was no claim that the written instructions contained in the Pilot Operating Handbook and the Autopilot's Operating Handbook were inaccurate or incomplete, and that the "duty to warn has never before required a supplier or manufacturer to provide training, only accurate and thorough instructions on the safe use of the product, as Cirrus ha[d] done."[310] The court also recognized that under "'ancient learning . . . one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all,'"[311] but that "a party is not responsible for damages in tort if the duty breached was 'merely . . . imposed by contract,' and not 'imposed by law.'"[312] Since the duty to provide the flight lesson at issue arose only by contract, plaintiffs could not recover tort damages, and because no duty was present, it was not necessary for the court to "reach the issues of educational malpractice, causation, or UNDAF's liability."[313]

In *Waugh v. Morgan Stanley & Co.*, the Illinois Court of Appeals concluded that a claim against a flight training company that arose from the alleged generalized failure to provide training in engine-out landings to a qualified and experienced multi-

306 *Id.*
307 *Id.* at 580.
308 *Id.*
309 *Id.* at 582.
310 *Id.*
311 *Id.* at 584.
312 *Id.*
313 *Id.*

engine pilot experienced in another make and model of aircraft was insufficient to withstand summary judgment when there was no evidence of a failure to provide training on any particular specific characteristic of the Cessna 421B aircraft.[314] The Illinois Court of Appeals based its holding on the "educational malpractice defense," recognizing that there are "three broad categories of educational malpractice claims":

> "(1) the student alleges that the school negligently failed to provide him with adequate skills; (2) the student alleges that the school negligently diagnosed or failed to diagnose his learning or mental disabilities; or (3) the student alleges that the school negligently supervised his training."[315]

Recognizing that the Seventh Circuit in a different context had predicted that the "Illinois Supreme Court would refuse to recognize the tort of educational malpractice,"[316] the Illinois Court of Appeals concluded that "if a claim raises questions about the reasonableness of an educator's conduct in providing educational services, or if a claim requires an analysis of the quality of education, then it is a noncognizable claim for educational malpractice."[317] In this case, the claim was that the instructor was negligent in training the pilot to fly the aircraft, which requires "an analysis of the educator's conduct in providing educational services."[318] Such a claim therefore "sounds in educational malpractice and is barred as a matter of law."[319]

B. General Aviation Revitalization Act

Under the Federal Aviation Regulations, a U.S. TC or Parts Manufacturing Authority (PMA) holder has a continuing duty to report defects or unsafe conditions to the FAA.[320] This obligation remains with the certificate for all products manufactured

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[314] Waugh v. Morgan Stanley & Co., 966 N.E.2d 540, 554 (Ill. App. Ct. 2012).

[315] *Id.* at 550 (quoting Dallas Airmotive, Inc. v. FlightSafety Int'l, Inc., 277 S.W.2d 696, 699 (Mo. Ct. App. 2008)). The court also cited the Minnesota Court of Appeals decision in *Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 552 (Minn. Ct. App. 2011), for the definition of educational malpractice claims. *Id.* at 555.

[316] *Id.* at 553.

[317] *Id.* at 555.

[318] *Id.*

[319] *Id.*

[320] *See generally* FAA Certification Procedures for Products and Parts, 14 C.F.R. § 21 (2013) (detailing the applicability and requirements for various FAA certificates).

under the certificate.[321] Thus, even a subsequent certificate holder has a duty to report information to the FAA, even for products actually manufactured by a predecessor. The scope of this duty and its impact on products liability law have been most fully developed under the eighteen-year statute of repose enacted by Congress in the General Aviation Revitalization Act (GARA) because one of the exceptions to GARA is the knowing misrepresentation, withholding, or concealment of information that is to be reported to the FAA under the continuing duty of airworthiness.[322]

Several recent cases illustrate the effect of this continuing duty and the benefits of GARA to non-U.S. manufacturers. First, unless a non-U.S. manufacturer's product is actually certified under a U.S. TC or PMA, there is no continuing duty *on the part of the manufacturer* to report information to the FAA under U.S. law; therefore, while GARA is applicable to provide a statute of repose in such cases, there is no exception to the GARA statute of repose for any failure to report information for the reasons described below. Second, GARA generally applies to protect even non-U.S. manufacturers from suit after eighteen years—provided the other requirements of GARA are satisfied and regardless of whether the manufacturers hold U.S. or foreign TCs. Finally, manufacturers and sellers of component parts may restart the "rolling provisions" of GARA as to any defective component parts.

In *Ovesen v. Mitsubishi Heavy Industries, Inc.*, the court held that aircraft manufactured outside the United States under a non-U.S. TC have the benefit of the GARA statute of repose.[323] Nevertheless, in a key decision, the court held that such a non-U.S. manufacturer cannot be held liable under the fraud exception to GARA for failures to report subsequent airworthiness issues because the TC was issued in another country, and there is no continuing duty to provide information *to the FAA* (rather than to a foreign authority); therefore, the exception that applies to knowing misrepresentation, concealment, or withholding of information *to the FAA* does not apply to that non-U.S. manufac-

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321 *See id.*

322 General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, § 2(a)(1), 108 Stat. 1552, 1552 (1994), amended by Pub. L. No. 105-102, § 3(e), 111 Stat. 2204, 2215 (1997) (codified at 49 U.S.C. § 40101 note (2006)).

323 Ovesen v. Mitsubishi Heavy Indus. of Am., Inc. (*Ovesen I*), No. 04 Civ. 2849 (JGK), 2012 WL 677953, at *6 (S.D.N.Y. Mar. 1, 2012).

turer.[324] The fact that the non-U.S. manufacturer subsequently obtained a U.S. TC that authorized the manufacture of the identical type of aircraft in the United States (which therefore created a duty to report information relating to continuing airworthiness for *all U.S.-manufactured aircraft* under that U.S. TC), did not reestablish liability to the non-U.S. manufacturer once that liability was cut off under the GARA statute of repose.[325] In other words, even if disclosure of the same information would have been required with regard to an aircraft manufactured under the U.S. TC, the fact that the accident aircraft was manufactured under the non-U.S. TC precluded the application of the GARA fraud exception that might have applied if the failure to provide the same information to the FAA applied to an accident involving an identical model or type of aircraft manufactured under the U.S. TC.[326] Thus, the claim remained barred under GARA.[327]

In *Ovesen v. Mitsubishi Heavy Industries of America, Inc.*, the district court considered a motion for reconsideration of its summary judgment in favor of Mitsubishi Heavy Industries, Ltd. and its subsidiary, Mitsubishi Heavy Industries of America, Inc., based upon GARA.[328] As set forth above, the *Ovesen* case involved the issue of whether "required information" was not disclosed to the FAA, such that the GARA statute of repose would not apply under the fraud exception to GARA.[329] The plaintiff sought reconsideration on the grounds that the district court's conclusion that information obtained by the non-U.S. manufacturer about an aircraft manufactured under a United Kingdom Civil Aviation Authority (CAA) Certificate was "required information," despite the FAA regulation that limited the obligation of a manufacturer to provide such information to those holding a *U.S.* TC.[330] The plaintiff also argued that providing the defendant the benefit of the GARA statute of repose, without imposing the obligations of providing such information under the FAA regulations, undermined the legislative intent of GARA to balance the obligations between providing information regard-

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[324] *Id.* at *4.

[325] *Id.* at *5.

[326] *See id.* at *4–5.

[327] *Id.* at *6.

[328] Ovesen v. Mitsubishi Heavy Indus. of Am., Inc. (*Ovesen II*), No. 04 Civ. 2849 (JGK), 2012 WL 1583566, at *1 (S.D.N.Y. May 7, 2012).

[329] *Id.* at *2.

[330] *Id.* at *2–3.

ing safety and providing a statute of repose to manufacturers.[331] The district court rejected this argument because the cases cited by the plaintiff related to unambiguous federal statutes, which controlled over administrative interpretations of the statute.[332] In this case, the statutory term "required information" was intrinsically ambiguous, and Congress assumed that the FAA would set the standards for "requirements."[333] As such, the statute itself expected that the FAA would define the term "required information."[334] Furthermore, the court concluded that it could not substitute its own judgment for that of the FAA on this issue or on the issue of whether foreign manufacturers were not entitled to the benefit of GARA and the statute of repose.[335] Finally, the court concluded that extending the benefits of GARA to the manufacturer in this case was not contrary to its purpose of supporting the domestic aircraft industry because the foreign manufacturer in this case, Mitsubishi, had sought a new TC to manufacture its aircraft in the United States; furthermore, it was only because of the manufacturing of the aircraft in the United States under that TC that the present action arose.[336] Accordingly, the court concluded that the present action fell precisely within the scope of the congressional intent in enacting GARA.[337]

In *Garcia v. Wells Fargo Bank Northwest, N.A. Trustee,* the district court held that GARA does not bar strict liability claims against a manufacturer *as a seller* of a part that was manufactured by a component manufacturer.[338] Even if the sale of the replacement part was incidental to the manufacture of the original aircraft, the district court concluded that the legislative history of GARA specifically states that claims against manufacturers in other roles are not preempted by GARA.[339] Additionally, the Florida statute of repose did not bar claims against an aircraft manufacturer that sells components made by another manufacturer

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331 *Id.* at *3.

332 *Id.*

333 *Id.*

334 *Id.*

335 *Id.* at *4.

336 *Id.* at *5.

337 *Id.*

338 Garcia v. Wells Fargo Bank Nw., N.A. Trustee, No. 10-20383-CV, 2011 WL 6257148, at *4 (S.D. Fla. Dec. 14, 2011).

339 *Id.* at *3.

within twelve years of the suit, even though the aircraft itself was first sold more than twelve years prior to the suit.[340]

Burton v. Twin Commander Aircraft, LLC concerned seven wrongful death claims arising from an accident in Mexico involving an aircraft operated by the Mexican government.[341] The Washington Supreme Court held that a successor TC holder (like a holder of a PMA) is a manufacturer under GARA because even if it does not make the airplane, it undertakes the manufacturer's duties for continuing airworthiness.[342] Most significantly, this case demonstrates the difficulty of applying the fraud exception in the context of TC holders' continuing duty relating to airworthiness.[343] The majority of the Washington Supreme Court, in an extensive opinion, held that the fraud exception requires a "state of mind" element and therefore requires knowing misrepresentation, concealment, or withholding of information.[344] Additionally, the case emphasized the importance of determining whether any information not disclosed is "required" to be disclosed in order to apply the fraud exception under GARA.[345] The court held that the continuing duty does not require that previously reported accidents be re-reported unless the manufacturer *determines* that the information is a *reportable* occurrence.[346] Three justices dissented from this majority position, arguing that the manufacturer should not be the one to make this determination before the duty of reporting comes into play.[347] The Washington Supreme Court held that the overall evidence of FAA communications precluded a finding of misrepresentations, but three justices again dissented from this opinion, stating that the inference of misrepresentation was permissible because memos to the manufacturer's service centers included information regarding this prior accident, but communications to the FAA, which could have resulted in grounding of the fleet, did not include this information.[348] Nevertheless, the majority of the Washington Supreme Court held that the information regarding the prior accident was not re-

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340 *Id.* at *4.

341 Burton v. Twin Commander Aircraft, LLC, 254 P.3d 778, 779 (Wash. 2011).

342 *Id.* at 784–85.

343 *See id.* at 786–87.

344 *Id.* at 785–87.

345 *Id.*

346 *Id.* at 786.

347 *See id.* at 792–97 (Stephens, J., dissenting).

348 *Id.* at 797.

quired information, and further that there was no evidence to support the contention that any failure to report the information was a knowing misrepresentation.[349]

In *Estate of Groschowske v. Romey*, the court held that a successor manufacturer that holds the TC and publishes a maintenance manual does so as a manufacturer and therefore is entitled to the protection of GARA.[350] The maintenance manual published *by a manufacturer* is not a separate component.[351] The maintenance manual that fails to address a latent defect is not a new claim, but it is barred just as a claim for the latent defect itself would be barred.[352] The district court held that the fraud exception requires knowledge of the defect and a knowing misrepresentation, withholding, or concealment, relying upon the recent *Burton v. Twin Commander, LLC* decision of the Washington Supreme Court.[353]

In *Nowicki v. Cessna Aircraft Co.*, a passenger seat slip case involving a Cessna 414 aircraft and the death of a passenger during a crash, the Florida Fourth District Court of Appeals rejected a fraud exception claim relating to disclosure of seat slip accidents involving other Cessna aircraft.[354] The court noted that the other Cessna seat slip incidents had involved loss of control of the aircraft when the pilot or co-pilot seats slipped on the rails and had not involved passenger seat slip incidents or crashworthiness claims.[355] The court held that the evidence regarding the other Cessna seat slip incidents was not "required" information that should have been disclosed to the FAA in connection with the Cessna 414.[356] Furthermore, given the different circumstances involved in the loss of control cases, rather than the crashworthiness case, the court held that there was no evidence of a causal relationship between the information relating to those other incidents and the injuries in the crash involved in this case.[357]

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[349] *Id.* at 791 (majority opinion).

[350] Estate of Groschowske v. Romey, 2012 WI App 41, ¶¶ 1–2, 340 Wis. 2d 611, 813 N.W. 2d 687.

[351] *Id.* ¶ 29.

[352] *Id.*

[353] *Id.* ¶ 32.

[354] Nowicki v. Cessna Aircraft Co., 69 So. 3d 406, 407, 410–11 (Fla. Dist. Ct. App. 2011).

[355] *Id.* at 408–09.

[356] *Id.* at 410.

[357] *Id.*

In *Slate v. United Technologies Corp.*, the California Court of Appeals held that even though a "redesign" of a part by prescribing a modification process (i.e., "shot peening" the part to improve its resistance from fatigue) restarted the statute of repose under GARA, the shot peened part or process did not fail to do its job because the part "would have failed whether it was shot peened or not."[358] The court held that the plaintiff's argument really was that the original design was defective and that shot peening would not correct that defect.[359] The court emphasized that the aircraft owner did not use a newer, redesigned part, which might have prevented the failure.[360] Nevertheless, the modification, which had occurred within eighteen years, was not the cause of the failure in this accident.[361] While not addressed by the court, a broader question is whether the engineering that resulted in the modification, rather than the redesign of the part, was negligently performed, and therefore whether the modification itself was insufficient and therefore a defective part, such that the failure to provide for the newer, alternative design at that time was the cause of the accident.[362] Of course, such a claim would basically involve redesigning the original aircraft part, which had been designed more than eighteen years prior to the suit; such a duty of redesign would be barred by GARA, whereas a claim for the failure of a replacement part or modification to perform in its intended manner would not have been barred by GARA.[363] Thus, it is only the latter instance that would survive the GARA challenge, and the failure to institute a new, alternative design of a part originally designed and manufactured more than eighteen years before suit was filed would not give rise to a cause of action, even if the newer, alternative design could have been instituted within that eighteen-year period as evidenced by the facts of the case.[364]

In *Inmon v. Air Tractor, Inc.*, the Florida Fourth District Court of Appeals held that only replacement parts restart the rolling statute of repose under GARA and under Florida's twelve-year

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358 Slate v. United Techs. Corp., No. B224143, 2011 WL 4470371, at *3 (Cal. Ct. App. Sept. 28, 2011) (unpublished).

359 *Id.*

360 *See id.*

361 *See id.* at *2–3.

362 *See id.*

363 *See id.*

364 *See id.*

statute of repose.[365] Newly designed and added parts do not start the rolling statute of repose, and there was no evidence that the newly designed and added part (a strengthener to the wing spar cap) even caused the accident in this case.[366] Thus, the plaintiff's claims were barred by both GARA and the Florida twelve-year statute of repose.[367]

In *United States Aviation Underwriters, Inc. v. Nabtesco Corp.*, the Ninth Circuit Court of Appeals affirmed a summary judgment in favor of Nabtesco, a manufacturer of a landing gear actuator, based upon the expiration of the GARA statute of repose.[368] The legal issue presented to the court was whether the trigger date for the statute of repose started on the date that the landing gear actuator was first delivered in an aircraft, or whether it was triggered by the date it was subsequently installed in another aircraft that was involved in the accident.[369] The Ninth Circuit held that GARA's definition of "aircraft" is ambiguous because it does not specifically state that the statute of repose is triggered as to both the aircraft and its constituent parts.[370] Thus, the issue presented was whether the reuse of a part on another aircraft as a used part would restart the GARA statute of repose, just as the component part manufacturer supplying a new part would.[371] In resolving this ambiguity, the Ninth Circuit relied principally upon the legislative history of GARA—particularly on the use of the word "new" in the section of GARA pertaining only to parts under the "rolling provisions" of GARA for replacement parts.[372] Since the "rolling provisions" only relate to new parts, the issue that the Ninth Circuit believed must be resolved by the legislative history was whether used parts were intended to be omitted from GARA, or whether all component parts were intended to be provided protection from the date upon which they were first delivered as a part of any aircraft or as a new replacement part.[373]

The Ninth Circuit held that the clear intent of GARA was to provide the benefits of the statute of repose not only to aircraft

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365 Inmon v. Air Tractor, Inc., 74 So. 3d 534, 538–39 (Fla. Dist. Ct. App. 2011).

366 *Id.*

367 *Id.*

368 U.S. Aviation Underwriters, Inc. v. Nabtesco Corp., 697 F.3d 1092, 1094 (9th Cir. 2012).

369 *Id.* at 1097.

370 *Id.*

371 *Id.*

372 *See id.* at 1098–1102.

373 *Id.* at 1098.

manufacturers, but also to component part manufacturers.[374] If an interpretation of the statute excluded protection for used parts, then the statute of repose would effectively be restarted every time a part is removed from the aircraft in which it was originally installed and placed in another aircraft.[375] Because the rolling provisions of GARA only provided a statute of repose for new parts, such a construction might lead to the absence of any protection under GARA for a part that had been removed from the aircraft in which it was originally installed, and for which it would have enjoyed the eighteen-year statute of repose.[376] The court specifically focused on a statement by Representative Glickman three days after the statute was enacted.[377] Representative Glickman stated that "a used propeller which has [three] years left on its applicable limitation period would still have only [three] years if installed [on another aircraft] in its used condition."[378] Thus, this statement indicates that (1) the statute of repose would have started on the date that the part was first delivered as a part of an aircraft; (2) the part would have had the benefit of that statute of repose for its first fifteen years; and (3) the part would only have an additional three years before the statute of repose would bar any claims related to the part's manufacturer.[379] In sum, the court stated that GARA should be interpreted such that the eighteen-year statute of repose applies to the accident aircraft or its component parts, such that each have the benefit of the eighteen-year statute of limitations that "commences with the delivery date of the used part to its first purchaser."[380]

VIII. JURISDICTION AND PROCEDURE

A. Personal Jurisdiction

1. Jurisdiction over Non-U.S. Manufacturers for Accidents in the United States

The issue of personal jurisdiction over non-U.S. manufacturers in products liability cases was addressed by the U.S. Supreme Court in two major cases decided in 2011. In both of those cases,

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374 *Id.*
375 *Id.*
376 *Id.*
377 *See id.* at 1100.
378 *Id.*
379 *See id.*
380 *Id.* at 1100–01.

discussed below, the Supreme Court held that the exercise of personal jurisdiction over manufacturers outside the United States would violate due process and ordered that the cases against those defendants be dismissed. The effects of those cases on personal jurisdiction over aviation manufacturers were immediately reflected in several cases decided in 2011 and 2012.

In *J. McIntyre Machinery, Ltd. v. Nicastro*, the U.S. Supreme Court addressed the issue of specific personal jurisdiction over a British manufacturer sued in a personal injury action in New Jersey regarding an accident involving a machine manufactured by the British manufacturer and sold through a U.S. distributor to the plaintiff's employer in New Jersey.[381] The New Jersey Supreme Court, noting that the British manufacturer had taken no action in New Jersey nor made any particular efforts to sell its products in New Jersey when it retained the U.S. distributor to sell its products in the United States, nevertheless held that personal jurisdiction was proper because it was foreseeable that the product might be sold in any state.[382]

A divided Supreme Court wrote three separate opinions. A four-Justice plurality opinion written by Justice Kennedy rejected any jurisdiction over the British manufacturer in New Jersey because there was no evidence of any intent on the part of the British manufacturer to take any purposeful action to "invoke or benefit from the protection" of the laws of New Jersey.[383] This position has been referred to as the "sovereignty" rule of jurisdiction.[384] Justice Breyer, in a separate opinion joined by Justice Alito, concurred in the result.[385] Justice Breyer started from the premise that "there have been many recent changes in commerce and communication, many of which are not anticipated by [the Supreme Court's] precedents[;] [b]ut this case does not present any of those issues."[386] As a result, Justice Breyer concluded that prior precedents, such as *World-Wide Volkswagen Corp. v. Woodson*,[387] which required "'something more' than simply placing 'a product into the stream of commerce,'" should provide the basis for the decision that the exercise of

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[381] J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2786 (2011).

[382] *Id.*

[383] *Id.* at 2791.

[384] *See id.* at 2789.

[385] *Id.* at 2791 (Breyer, J., concurring).

[386] *Id.*

[387] 444 U.S. 286 (1980); *see also* Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987).

personal jurisdiction over the British manufacturer would be unconstitutional.[388] Justice Ginsburg, joined by Justices Sotomayor and Kagan, issued a dissenting opinion and would have found personal jurisdiction based upon the British manufacturer's efforts to market its products at U.S. trade shows and through trade organizations throughout the United States.[389] Justice Ginsburg also noted that two trillion dollars in foreign goods were imported into the United States in 2010, and that "[w]hen industrial accidents happen, a long-arm statute in the State where the injury occurs generally permits assertion of jurisdiction, upon giving proper notice, over the foreign manufacturer."[390] According to Justice Ginsberg, the appropriate test is that of "reason and fairness."[391] Justice Ginsburg concluded by noting that the British manufacturer "'purposefully availed itself' of the United States market nationwide, not a market in a single State or a discrete collection of States," and that when specific jurisdiction "achieves its full growth, considerations of litigational convenience and the respective situations of the parties would determine when it is appropriate to subject a defendant to trial in the plaintiff's community."[392] Justice Ginsburg also contrasted this case with a case in which an entity's activities "are largely home-based . . . without designs to gain substantial revenue from sales in distant markets."[393]

In *Smith v. Teledyne Continental Motors, Inc.*, the federal district court applied the principles announced in the recent U.S. Supreme Court decision in *McIntyre Machinery* to determine whether personal jurisdiction existed in South Carolina over a U.S. manufacturer, Teledyne Continental Motors (TCM).[394] While this case involved a U.S. manufacturer, it illustrates the approach to jurisdiction likely to be applied under *McIntyre Machinery* to non-U.S. manufacturers of aircraft and components. The case resulted from a fatal injury to a person on the ground who was struck by a single-engine aircraft as it attempted a forced landing near Myrtle Beach, South Carolina, following an

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388 *McIntyre Mach.*, 131 S. Ct. at 2792 (Breyer, J., concurring) (quoting *Asahi*, 480 U.S. at 111–12).

389 *Id.* at 2797 (Ginsburg, J., dissenting).

390 *Id.* at 2799 n.6, 2800.

391 *Id.* at 2800.

392 *Id.* at 2801, 2804.

393 *Id.* at 2804.

394 Smith v. Teledyne Cont'l Motors, Inc., 840 F. Supp. 2d 927, 929 (D.S.C. 2012).

engine failure just offshore.[395] The aircraft was a homebuilt kit aircraft built by the pilot, a South Carolina resident.[396] Significantly, the decision does not state where the engine on the accident aircraft was purchased.[397] Instead, the court noted that TCM had sold at least 400 engines for a total revenue of approximately $1.6 million in South Carolina over the preceding ten years; one-third of all aircraft in South Carolina have TCM engines; TCM maintains a continuous warranty program with South Carolina customers; and "it advertises in South Carolina through aviation magazines."[398] TCM also has contracts with eleven South Carolina "fixed base operators" (FBOs) to act as "stores/service centers" for TCM products, performing, among other things, warranty service on TCM engines.[399] Rather than simply applying the "stream of commerce" theory of personal jurisdiction, the court evaluated TCM's contacts based upon the "stream of commerce plus" test that it concluded was the holding of the Supreme Court as a result of its multiple opinions in *McIntyre Machinery*.[400] Based on its analysis under that test, the court concluded that TCM's additional contacts with South Carolina showed that TCM met the test of taking "action purposefully directed toward the forum state [South Carolina] or otherwise invoking the benefits and protections of the law of the state."[401] As such, TCM met the requirements for purposeful conduct and traditional notions of fair play and substantial justice sufficient to support specific jurisdiction in this case.[402] The court noted that TCM's efforts to serve the market in the forum state (South Carolina) were the type of efforts to "serve . . . the market for its product," which were described in *Goodyear Dunlop Tire*, discussed below, and that "[t]his language [from the unanimous U.S. Supreme Court in that case] fits the present case exactly."[403]

The result in *Smith* should be contrasted with the decision of the U.S. District Court for the Western District of Kentucky in *Crouch v. Honeywell International, Inc.*, another case involving per-

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395 *Id.* at 928.
396 *Id.*
397 *See id.*
398 *Id.* at 932.
399 *Id.*
400 *Id.* at 931.
401 *Id.* at 932.
402 *Id.* at 933–34.
403 *Id.* at 934.

sonal jurisdiction over TCM for products liability claims filed in Kentucky regarding an accident in that state.[404] Again, the engine involved in this case was not sold to a Kentucky resident, but the court noted that TCM "has no customers in Kentucky."[405] In *Crouch*, the plaintiff only asserted general jurisdiction as a basis for its claims against TCM, and the district court, applying the requirements for general jurisdiction found in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[406] concluded that TCM's contacts with Kentucky were "more tenuous than those that were found insufficient in *Helicopteros*."[407] Consequently, the district court dismissed the plaintiff's claims without prejudice, allowing them to be refiled in another state in which personal jurisdiction could be established.[408]

The important lesson from this case is that many of the contacts that were insufficient to support general jurisdiction in *Crouch* were very similar to those that supported specific jurisdiction in the *Smith* case under the "stream of commerce plus" test, subsequently endorsed by the Supreme Court in the *McIntyre Machinery* and *Goodyear Dunlop Tire* cases. Even though the products in both cases may not have been sold to residents of the forum state, the facts that the accident occurred in the forum state and that there were substantial efforts to market and support the product in that particular state were enough for the *Smith* court to find specific jurisdiction over the manufacturer when the accident involving the product occurred in that state.[409] Again, the *Smith* decision does not say whether the engine had been sold in South Carolina (and therefore it should not be presumed), but it appears that the fact that a significant number of engines were sold directly to that market was a key element of that court's reasoning that specific jurisdiction was appropriate.[410]

Recent non-aviation products liability decisions in the federal courts have also applied the "stream of commerce plus" theory as the basis for personal jurisdiction on the grounds that a plu-

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404 Crouch v. Honeywell Int'l, Inc., 682 F. Supp. 2d 788, 791–92 (W.D. Ky. 2010).

405 *Id.* at 792.

406 466 U.S. 408, 416–18 (1984).

407 *Crouch*, 682 F. Supp. 2d at 796.

408 *Id.*

409 *See* Smith v. Teledyne Cont'l Motors, Inc., 840 F. Supp. 2d 927, 929 (D.S.C. 2012).

410 *Id.* at 932–34.

rality decision is not binding Supreme Court precedent, and therefore only the narrowest reasoning agreed to by a majority of the Supreme Court Justices is controlling precedent.[411] Thus, since a majority of the Justices only denied personal jurisdiction based on the "stream of commerce plus" theory, the federal courts are not applying the most restrictive "sovereignty" reasoning of the plurality for denying personal jurisdiction; rather, federal courts only deny jurisdiction if it is not supported by the "stream of commerce plus" theory on grounds as restrictive as those presented in *McIntyre Machinery*. As noted by Justice Breyer, the "stream of commerce plus" test may be satisfied by a "'regular course' of sales" of the defendant's goods in the forum state, or "something more, such as special state-related design, advertising, advice, marketing, or anything else."[412]

The lesson for non-U.S. manufacturers seeking to minimize jurisdictional contacts is to not sell or service products directly in all states in the United States, but rather to do so only through a distributor located in a state in which jurisdiction over the non-U.S. manufacturer may be acceptable. A series of cases that exemplifies this method of doing business involves Pilatus Aircraft Ltd. In *D'Jamoos v. Pilatus Aircraft Ltd.*, the manufacturer successfully avoided jurisdiction in Pennsylvania, where a crash occurred, because its contacts with Pennsylvania were limited and it sold aircraft exclusively through a U.S. distributor located in Colorado; thus, the case was transferred to Colorado.[413] Notably, however, Pilatus Aircraft Ltd. was found to be subject to personal jurisdiction in New Hampshire in a companion case arising from the same accident because the accident aircraft had been serviced in New Hampshire by a service center using allegedly defective service manuals which had been sold *directly* by Pilatus Aircraft Ltd. to the New Hampshire service

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[411] *See* UTC Fire & Security Ams. Corp., Inc. v. NCS Power, Inc., 844 F. Supp. 2d 366, 376–77 (S.D.N.Y. 2012) (presence of sales agent rather than independent distributor supported "stream of commerce plus" personal jurisdiction in New York); Askue v. Aurora Corp. of Am., No. 1:10-CV-0948-JEC, 2012 WL 843939, at *8 (N.D. Ga. Mar. 12, 2012) (facts showing even fewer contacts than in *McIntyre Machinery* supported denial of personal jurisdiction based on "stream of commerce plus" theory); Ainsworth v. Cargotec USA, Inc., No. 2:10-CV-236-KS-MTP, 2011 WL 6291812 (D. Miss. Dec. 15, 2011).

[412] J. McIntyre Mach. v. Nicastro, 131 S. Ct. 2780, 2791–92 (2011) (Breyer, J., concurring).

[413] D'Jamoos v. Pilatus Aircraft Ltd., 566 F.3d 94, 111 (3d Cir. 2009).

center.[414] Thus, to avoid jurisdictional contacts, even service publications should be distributed by the U.S. distributor, rather than by the non-U.S. manufacturer.[415]

In addition to cases involving manufacturers that distribute products (either directly or indirectly) into the United States to individual aircraft owners and operators, the issue of jurisdiction over component manufacturers that only supply products to the manufacturers of the products into which the parts are incorporated involves different issues under *McIntyre Machinery* because the component manufacturer does not distribute products through an agent or distributor. The U.S. Supreme Court did not consider that distinction, but it did remand *Willemsen v. Invacare Corp.* "for further consideration in light of *Nicastro*."[416] On remand, the Oregon Supreme Court upheld personal jurisdiction because the component parts were specifically designed for a product that was marketed nationally and experienced regular and substantial sales in Oregon.[417]

2. *General Jurisdiction for Accidents Outside the United States Involving U.S. Citizens*

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the U.S. plaintiffs (the parents of two sons who died in an accident in France) sought to assert personal jurisdiction in their home state of North Carolina over a non-U.S. subsidiary of a U.S. corporation for claims alleging the manufacture of a defective product that allegedly caused the accident.[418] The Supreme Court, in an opinion by Justice Ginsburg, was unanimous in holding that the attempted exercise of personal jurisdiction was unconstitutional.[419] Because there was no relationship between

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414 D'Jamoos v. Atlas Aircraft Ctr., Inc., 669 F. Supp. 2d 167, 172 (D.N.H. 2009).

415 *See id.*; *see also* Newman v. European Aeronautic Def. & Space Co. EADS N.V., No. 09-10138-DJC, 2011 WL 2413792, at *6 (D. Mass. June 16, 2011).

416 Willemsen v. Invacare Corp., 282 P.3d 867, 869–70 (Or. 2012).

417 *Id.* at 877; *see also* Russell v. SNFA, 965 N.E.2d 1, 3–4, 19 (Ill. App. Ct. 2011), *aff'd*, 2013 IL 113909 (2013) (French component manufacturer subject to jurisdiction in Illinois for accident allegedly resulting from use of component part exclusively made for Agosta helicopter intended to be distributed in United States); Vibratech v. Frost, 661 S.E.2d 185, 187, 190–91 (Ga. Ct. App. 2008) (component part manufacturer that supplied part exclusively for OEM engine manufacturer also subject to jurisdiction along with OEM manufacturer in jurisdiction where engine had been sold).

418 Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2850 (2011).

419 *Id.*

North Carolina and the accident, other than the plaintiffs' residence, the North Carolina courts upheld personal jurisdiction over the non-U.S. subsidiary based on general jurisdiction.[420] Justice Ginsburg noted that the non-U.S. subsidiary undertook no efforts to market its products in the United States, and only a small percentage of its products were ultimately sold through other affiliated companies to any North Carolina residents to equip specialized vehicles such as "cement mixers, waste haulers, and boat and horse trailers," rather than the type of vehicles (buses) involved in the accident.[421] The attenuated business activity of the non-U.S. subsidiary "f[e]ll far short of the 'continuous and systematic general business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State."[422]

In *Garcia v. Wells Fargo Bank Northwest NA Trustee,* a case against a U.S. defendant resulting from an accident in Venezuela, the U.S. District Court for the Southern District of Florida held that the U.S. defendant, a corporate trustee owner of the aircraft, was not subject to personal jurisdiction in Florida.[423] The accident flight had no connections with Florida, and the primary argument for jurisdiction was that Wells Fargo acted as trustee for thousands of aircraft, many of which presumably operated within the state of Florida.[424] Additionally, when Florida attempted to impose taxes on the aircraft purchased, Wells Fargo contested those taxes in Florida.[425] Wells Fargo showed that it did not do business in Florida, and it had no offices or employees in Florida.[426] The district court held that the alleged Florida contacts were speculative and, in any event, insufficient to establish any purposeful activity directed toward Florida with regard to the aircraft involved in the accident.[427] The district court also distinguished this case with respect to personal jurisdiction on the grounds that even if aircraft for which Wells Fargo acted as trustee operated in Florida, Wells Fargo had no

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420 *Id.* at 2851.

421 *Id.* at 2852.

422 *Id.* at 2857 (citing Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 416 (1984)).

423 Garcia v. Wells Fargo Bank Nw. NA Trustee, No. 1:10-cv-20383-JLK, 2011 WL 3439530, at *1 (S.D. Fla. Aug. 5, 2011).

424 *Id.*

425 *Id.* at *4 & n.4.

426 *Id.* at *1.

427 *Id.* at *7.

control over the operation of those aircraft.[428] The court also concluded that the contacts did not satisfy the requirements of due process under the U.S. Constitution, particularly the requirement that the exercise of personal jurisdiction must satisfy the requirements of "fair play and substantial justice."[429]

Despite the high standard of continuous and systematic contacts required to establish general jurisdiction for accidents outside the United States, U.S. courts have continued to find the existence of general jurisdiction. In *Ashbury International Group, Inc. v. Cadex Defence, Inc.*, a patent infringement case, the district court held that the high standard was met where a company had more than $5 million (41%) in annual sales in Virginia; this fact supported a finding of the requisite continuous and systematic contacts with Virginia required for general personal jurisdiction.[430]

Finally, in at least one U.S. Circuit Court of Appeals, the mere presence of an agent in the jurisdiction has been found sufficient to establish general jurisdiction over a non-U.S. parent corporation. In *Bauman v. DaimlerChrysler Corp.*, the Ninth Circuit held that the existence of general jurisdiction over a U.S. subsidiary that acted as the agent (although not the alter ego) of a non-U.S. parent subjected the non-U.S. parent to general jurisdiction in the United States.[431] While *Bauman* was decided before *Goodyear*, the Ninth Circuit denied a request for reconsideration based on the *Goodyear* decision.[432] In a dissent from the denial of the request for reconsideration, seven circuit judges complained that the agency theory of personal jurisdiction is inconsistent with *Goodyear*; furthermore, they noted that the U.S. government also opposed personal jurisdiction over a non-U.S. corporation with regard to an unrelated cause of action simply because of the presence of an agent in the United States, because it interfered with "negotiations of international agreements on the reciprocal recognition and enforcement of judgments."[433]

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[428] *Id.* at *6.

[429] *Id.*

[430] Ashbury Int'l Grp., Inc. v. Cadex Defence, Inc., No. 3:11CV00079, 2012 WL 4325183, at *6–7 (W.D. Va. Sept. 20, 2012).

[431] Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 931 (9th Cir. 2011).

[432] *See* Bauman v. DaimlerChrysler Corp., 676 F.3d 774, 774 (9th Cir. 2011).

[433] *Id.* at 779.

*3. Post-*McIntyre *and* Goodyear Dunlop Tire *Aviation Cases*

In *Sullivan v. Hawker Beechcraft Corp.*, the South Carolina Court of Appeals affirmed the dismissal of three nonresident defendants in a case in which the plaintiff, an Ohio resident, was injured in a July 2005 plane crash in South Carolina.[434] The airplane was owned by an Ohio resident, and was maintained and serviced in Ohio, Florida, and Arkansas.[435] The plaintiff had commenced two prior lawsuits in Ohio but filed this lawsuit almost three years after the crash because Ohio's two-year statute of limitations had expired.[436] The defendants seeking dismissal were all nonresidents of Ohio and filed motions to dismiss that were supported by affidavits asserting that their principal places of business were outside of South Carolina and that they had never solicited or conducted business in the state.[437] They also maintained that no more than 1% of their revenue came from sales to customers located in South Carolina; no goods or services were produced or rendered in South Carolina; and the defendants had never obtained a business license in South Carolina.[438] Under the South Carolina long-arm statute, long-arm jurisdiction exists over a defendant causing a tortious injury within the state, but only if that defendant "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered" in that state.[439] The plaintiff failed to submit any affidavits in response, failed to make a timely request for jurisdictional discovery, and made a request that "offered mere speculation and conclusory assertions, without any specific facts to support the request."[440] The South Carolina Court of Appeals held under its "two-step analysis" that the first step of the analysis, satisfaction of the state long-arm statute, was not met, and therefore confirmed the dismissal for lack of personal jurisdiction.[441]

In *Van Heeswyk v. Jabiru Aircraft Pty., Ltd.*, the Arizona Court of Appeals considered the issue of personal jurisdiction over (1) an

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434 Sullivan v. Hawker Beechcraft Corp., 723 S.E.2d 835, 837 (S.C. Ct. App. 2012).

435 *Id.*

436 *Id.*

437 *Id.* at 838.

438 *Id.*

439 S.C. CODE ANN. § 36-2-803(1)(d) (2003).

440 *Sullivan*, 723 S.E.2d at 840.

441 *Id.* at 839.

Australian aircraft manufacturer that had manufactured an aircraft engine installed in Arizona on a kit aircraft manufactured by an Arizona retailer, and (2) an Australian dealer for the manufacturer of the kit aircraft involved in the accident.[442] The accident resulted in the death of the Arizona purchaser of the kit aircraft when the aircraft propeller separated from the aircraft engine in flight.[443] The Australian manufacturer submitted affidavits stating that it had no offices or employees in Arizona and did not sell its products directly to retail customers anywhere in the United States.[444] Instead, all of its products were sold through three U.S. distributors located in California, Tennessee, and Florida.[445] The trial court had dismissed the claims against the Australian manufacturer for lack of personal jurisdiction.[446]

The Arizona Court of Appeals reversed, holding that based upon the factual discovery in the case, which showed that a substantial number of aircraft had been sold to Arizona residents in the year in which the accident aircraft had been sold, and which showed that the independent distributor agreements specifically required best efforts to service all markets within its territory, including Arizona, there was evidence of a deliberate effort to "penetrate the American market."[447] In 2006 (the year of the accident), there had been sales of sixty-one Jabiru products in Arizona, including five engines of the type involved in this accident.[448] The quantity and targeted nature of such sales were sufficient to support the exercise of specific jurisdiction for claims arising out of those sales, distinguishing this case from the recent Supreme Court decisions in *Goodyear Dunlop Tire* and *McIntyre Machinery*,[449] the latter of which the court characterized as involving a "single isolated sale" in which there was no "regular . . . flow or 'regular course' of sales" into the forum state.[450] The fact that the aircraft was sold to Arizona by the Tennessee independent distributor, whose territory did not include Arizona, instead of being sold by the California independent distributor,

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442 Van Heeswyk v. Jabiru Aircraft Pty., Ltd., 276 P.3d 46, 49 (Ariz. App. 2012).

443 *Id.*

444 *Id.*

445 *Id.*

446 *Id.*

447 *Id.* at 51 (internal quotation marks omitted).

448 *Id.* at 52.

449 *See id.* at 52–53.

450 *Id.* at 53 (quoting J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2792 (2011)).

was not considered dispositive.[451] Indeed, the court noted that each distributor was obligated to "provide to its customers service, parts[,] and warranty work . . . in its Territory regardless of what dealer sold the product."[452] Similarly, the fact that the independent distributorship agreements had expired also was not dispositive because the sales had continued, thereby indicating that the same method of marketing the products in the United States had continued, and thus the sale was not "random [or] fortuitous."[453] Finally, the court recognized that jurisdiction may have been proper in Tennessee, where the independent distributor was located, but noted that "'personal jurisdiction is not a zero-sum game; a defendant may have the requisite minimum contacts . . . [in] more than one state with respect to a particular claim.'"[454]

In *Raffile v. Executive Aircraft Maintenance*, the New Mexico federal district court considered a case brought by a Connecticut passenger of an aircraft purchased and subjected to a pre-purchase inspection in Arizona, and owned by a resident of Nevada.[455] The accident occurred near Las Vegas, New Mexico, on a flight from Arizona, following the purchase of the aircraft the previous day in Arizona.[456] The New Mexico court held that there was no jurisdiction over the Arizona aircraft maintenance facility that had performed the pre-purchase inspection, and there was no personal jurisdiction over the previous owner of the aircraft, a Nevada resident.[457] During the pendency of the action, the Arizona statute of limitations expired, and the plaintiff both opposed the dismissed defendants' motions to have their dismissals certified as Rule 54(b) final dismissals and filed a motion seeking to transfer the remaining case, which at that point involved only one defendant, the Arizona aircraft broker (Barron Thomas Scottsdale), which had not opposed New Mexico jurisdiction.[458] After extensive analysis, the court concluded that either 28 U.S.C. § 1404(a), or more appropriately 28 U.S.C. § 1361, which specifically addresses transfers to cure a lack of

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451 *Id.* at 53–54.

452 *Id.* at 54 n.6.

453 *Id.* at 54 (internal quotation marks omitted).

454 *Id.* (quoting Planning Grp. of Scottsdale, L.L.C. v. Lake Mathews Mineral Props., Ltd., 226 Ariz. 262, 349 (2011)).

455 Raffile v. Exec. Aircraft Maint., 831 F. Supp. 2d 1261, 1263 (D.N.M. 2012).

456 *Id.*

457 *Id.* at 1271.

458 *See* Raffile v. Exec. Aircraft Maint., No. CIV-11-0459JB/WPL, 2012 WL 592878, at *4–5 (D.N.M. Feb. 21, 2012).

jurisdiction, supported the transfer of the case to Arizona.[459] While the New Mexico federal district court could not predict the effect of its dismissal of the two non-resident defendants in the New Mexico action, it opined that the Arizona statute of limitations had probably been "tolled" by reason of the pendency of the Arizona action, and that by not entering a final judgment, it might assist the plaintiff in avoiding a statute of limitations defense when it attempted to amend the complaint to rejoin those defendants after the transfer to Arizona.[460] For this reason, it could not satisfy the requirement that there be "'no just reason for delay'" in the entry of the Rule 54(b) final judgment, and because the plaintiff did not intend to appeal the dismissal based on lack of personal jurisdiction in New Mexico, there was no other reason favoring the defendants that supported such a certification.[461] It is clear that this court would have been in a much better position to grant a motion to transfer under 28 U.S.C. § 1361 if it had been made prior to the order of dismissal. This case again demonstrates the importance to a federal court plaintiff of not only attempting to respond to a motion to dismiss for lack of personal jurisdiction, but also seeking transfer of the case to another federal court in which jurisdiction would clearly be proper as an alternative—particularly if the statute of limitations might expire in that other jurisdiction as a result of the pendency of the first case and any jurisdictional motions or appeals.

In *Martinez v. Aero Caribbean*, the district court granted a motion to dismiss filed by the aircraft manufacturer ATR, which was organized under the laws of France and maintained its principal place of business in Toulouse, France.[462] In addition to the products liability claims against ATR, the plaintiff also asserted claims under the Montreal Convention against airlines operating the accident aircraft.[463] While the decision did not specifically state the location of the accident, it was obviously not in California. For this reason, the plaintiffs attempted to assert general jurisdiction over ATR in California.[464] The district court held that sales of roughly 1% of ATR's overall sales—with the

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459 *Id.* at *7–8.

460 *Id.* at *8.

461 *Id.* (quoting FED. R. CIV. P. 54(b)).

462 Martinez v. Aero Caribbean, No. C 11-03194 WHA, 2012 WL 1380247, at *4 (N.D. Cal. Apr. 20, 2012).

463 *Id.* at *1.

464 *Id.* at *1–2.

sales being completed in France—including signing the contracts and delivering the aircraft, were insufficient to support general jurisdiction.[465] Similarly, purchases of supplies and the operation of ATR aircraft in California by other entities did not support general jurisdiction.[466] The court held that personal service on an officer of ATR while doing business in California was not sufficient to support general jurisdiction.[467] The court also rejected an argument that further discovery should be permitted regarding ATR's relationship with ATR North America because the plaintiffs had been aware of that relationship and had failed to conduct jurisdictional discovery during the time permitted.[468] Finally, the court denied a motion to transfer under 28 U.S.C. § 1404 because the plaintiffs provided no legal analysis or factual support for their allegation that bringing the action in Virginia, where ATR North America is located, would provide jurisdiction over ATR France.[469]

In *Weinberg v. Grand Circle Travel, LLC*, the Massachusetts district court considered personal jurisdiction over a Tanzanian balloon operator for claims for wrongful death and injuries resulting from a balloon excursion in Tanzania during which the plaintiff's decedent, a Florida resident, was killed and another plaintiff, also a Florida resident, was injured.[470] The balloon excursion had been sold to the plaintiff's decedent and the plaintiff through a Massachusetts company, Grand Circle Travel, LLC d/b/a Overseas Adventure Travel (Overseas Adventure).[471] Overseas Adventure did not have any direct dealings with the Tanzanian balloon operator, but the Tanzanian balloon operator typically secured its business through an agent, Kibo Guides, in Tanzania.[472] Kibo Guides contacted Tourism Services, another Tanzanian company, which then contacted Overseas Adventure regarding the arrangement of the balloon excursion.[473] As the district court noted, the plurality decision in *McIntyre Machinery* requires that a foreign defendant purposefully avail itself of the benefits of doing business in the particular state, and

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465 *Id.* at *2.

466 *Id.* at *2–3.

467 *Id.*

468 *Id.* at *3.

469 *Id.*

470 Weinberg v. Grand Circle Travel, LLC, 891 F. Supp. 2d 228, 234 (D. Mass. 2012).

471 *Id.*

472 *Id.* at 234–36.

473 *Id.* at 235–36.

while it was clear that the balloon operator, Serengeti Balloons, derived substantial business from the United States generally, there was no indication that it had targeted residents of Massachusetts.[474] Furthermore, other companies' activities that reached Massachusetts residents did not directly involve any action by Serengeti Balloons.[475]

The plaintiff also attempted to establish that Overseas Adventure was an agent of Serengeti Balloons, or that Serengeti Balloons had ratified the actions of Overseas Adventure by selling the balloon excursion to the plaintiff's decedent and the plaintiff, and by accepting them on the flight without any further payment.[476] The court considered the agency question to be a close one but concluded that there was no conduct by Serengeti Balloons that would have led the plaintiff's decedent and the plaintiff to conclude that Overseas Adventure was an agent for Serengeti Balloons, even though Overseas Adventure represented in its brochures that it was an agent for Serengeti Balloons.[477] Additionally, while the plaintiff's decedent and the plaintiff were allowed to board the balloon without additional payment, it might be argued that Serengeti Balloons ratified the actions of Overseas Adventure. However, the court concluded that there was simply no evidence to suggest that Serengeti Balloons knowingly accepted the benefits of a transaction initiated in Massachusetts, and under the *McIntyre Machinery* plurality analysis, the court could not conclude that there was an agency relationship sufficient to support long-arm jurisdiction.[478]

The district court also criticized the recent *McIntyre Machinery* decision as allowing a foreign corporate defendant to "structure its distribution system and have its products or services initially reach only one state while avoiding the jurisdiction in almost any other state to which they are then shipped by the distributor."[479] Despite the district court's reservations about the unfairness of denying long-arm jurisdiction over Serengeti Balloons, which obviously derived substantial benefit from booking its services to U.S. residents, the court held that personal jurisdiction

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474 *See id.* at 245–46.

475 *See id.*

476 *See id.* at 239, 242.

477 *Id.* at 243.

478 *Id.*

479 *Id.* at 243 n.7 (quoting Arthur R. Miller, Are They Closing the Courthouse Doors?, University Professorship Lecture at New York University (Mar. 19, 2012)).

under the Massachusetts long-arm statute could not be established and that the claims against Serengeti Balloons must be dismissed.[480]

In *Convergence Aviation, Ltd. v. United Technologies Corp.*, the U.S. District Court for the Northern District of Illinois considered the issue of jurisdiction over BBA Aviation, PLC, which owned several companies that had been involved in the repair of a Piper Malibu turboprop engine prior to its failure.[481] The plaintiff sought to hold BBA subject to personal jurisdiction in Illinois primarily based on its relationship with its subsidiaries.[482] Under Illinois law, jurisdiction over a parent company for the actions of its subsidiaries can only be found "where the corporate veil can be pierced, or perhaps where all the corporate formalities are observed but the subsidiary's only purpose is to conduct the business of the parent."[483] The leading case supporting such jurisdiction is *Maunder v. DeHavilland Aircraft of Canada, Ltd.*, in which the parent company was held subject to personal jurisdiction because the subsidiary's only business was to sell the parent company's parts, all of the subsidiary's stock was owned by the parent, the parent paid the salaries of the subsidiary's directors, and the parent guaranteed the subsidiary's leases.[484] The subsidiary was also controlled by the parent company's vice president of sales.[485] In *Convergence Aviation*, however, the court carefully analyzed the factors which would indicate control by the parent over the subsidiary and concluded that the only factor that indicated control was the fact that the subsidiaries could not arrange their own financing.[486] Otherwise, the court concluded that the holding company did not manage the day-to-day activities of the subsidiaries, and that despite consolidated financial statements, overlapping officers and executives, a common trademark policy, lack of dividends, the existence of internal controls, and required compliance with policy manuals written by the parent, the parent company did not exercise the "unusually high degree of control" necessary to

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480 *Id.* at 247–48.

481 Convergence Aviation, Ltd. v. United Techs. Corp., No. 10 C 2021, 2012 WL 698391, at *1 (N.D. Ill. Feb. 29, 2012).

482 *Id.*

483 *Id.* at *2.

484 Maunder v. DeHavilland Aircraft of Canada, Ltd., 466 N.E.2d 217, 222 (1984).

485 *Id.* at 219.

486 *Convergence Aviation*, 2012 WL 698391, at *7.

find that the subsidiaries existed for no purpose other than conducting the business of the parent.[487] Instead, it appears that the court would have required "day-to-day management control" over the subsidiaries to exercise personal jurisdiction over the parent based upon the subsidiaries' activities in Illinois.[488]

B. Federal Jurisdiction—Removal

In *Laugelle v. Bell Helicopter Textron, Inc.*, the district court considered a motion to remand for a case that had been removed by defendant Bell Canada prior to service on any of the Delaware corporate defendants.[489] The court recognized that 28 U.S.C. § 1441(b) states that an action "shall be removable *only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.*"[490] Bell Canada had removed the case prior to service; however, the court noted that there was a split in authority regarding the effect of removal prior to service on resident defendants.[491] The court noted that 28 U.S.C. § 1441(b) was intended to address the risk of "gamesmanship," where a plaintiff may name a resident party as a defendant but then not serve that defendant.[492] Nevertheless, the court noted that under Delaware law, service of the complaint cannot proceed until the court issues a summons and the service is perfected by a sheriff or private process server.[493] The court seemed to believe that it had been impossible for the plaintiffs to effect service of process prior to removal.[494] Accordingly, the court concluded that it would not make removability "'turn on the timing or sequence of service of process'"[495] or "'blindly [apply] the . . . language of § 1441(b) [to eviscerate] the purpose of the forum defendant rule,'" thereby creating an opportunity for gamesmanship by the defendants.[496] Ultimately, the court based its decision on "the Third Circuit's clear preference

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487 *Id.*

488 *Id.*

489 Laugelle v. Bell Helicopter Textron, Inc., CIV A. No. 10-1080 (GMS), 2012 WL 368220, at *1 (D. Del. Feb. 2, 2012).

490 *Id.* at *2 (quoting 28 U.S.C. § 1441(b) (2006)).

491 *Id.*

492 *Id.*

493 *Id.* at *2 n.5 (citing Del. Code Ann. tit. 10, § 3103 (2013)).

494 *See id.* at *2–3.

495 *Id.* at *3 (quoting Oxendine v. Merck & Co., 236 F. Supp. 2d 517, 526 (D. Md. 2002)).

496 *Id.* (quoting Fields v. Oreganon USA Inc., No. 07 2922 (SRC), 2007 WL 4365312, at *4 (D.N.J. Dec. 12, 2007)).

for remand as articulated in [prior cases], and considering the purpose of the forum defendant rule and the deference afforded to the plaintiff's choice of forum, the court [found] that removal under § 1441(b) was improper."[497] The court also considered whether there was an independent basis for federal-question jurisdiction under § 1441(b).[498] The Delaware district court recognized that under Third Circuit authority, the Federal Aviation Act implicitly preempts state law in the area of aviation safety.[499] However, the court adopted the reasoning of another district court in concluding that "such preemption can *only be raised as a defense and is insufficient to confer federal question jurisdiction.*"[500]

In *Lapkin v. AVCO Corp. ex rel. KS Gleitlager USA, Inc.*, the U.S. District Court for the Northern District of Texas considered the issue of diversity subject-matter jurisdiction in a case in which the plaintiff, the widow of the deceased pilot, filed a wrongful death action in her individual and representative capacity as the personal representative of the estate of the decedent.[501] The decedent was a resident of the state of New York, and complete diversity would exist if the widow's citizenship was deemed to be that of the decedent.[502] Under 28 U.S.C. § 1332(c)(2), the legal representative is deemed to be a citizen of the same state as the decedent.[503] However, because the plaintiff filed suit individually and as the legal representative, her individual citizenship had to be considered; because she was a Texas citizen and one of the defendants was also a citizen of Texas, complete diversity was lacking.[504] Finally, the court noted that "the citizenship of all parties named, served or unserved, must be considered to determine diversity."[505] Thus, the court held that complete diversity was lacking and remanded the case to state court.[506]

In *Carrs v. AVCO Corp.*, a companion case to *Lapkin*, the district court considered the plaintiff's motion for voluntary dismis-

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497 *Id.*

498 *Id.* at *3–4.

499 *Id.*

500 *Id.* at *4 (quoting XL Specialty Co. v. Vill. of Schaumburg, No. 06 C 2299, 2006 WL 2054386, at *2 (N.D. Ill. July 20, 2006)).

501 Lapkin v. AVCO Corp. *ex rel.* KS Gleitlager USA, Inc., No. 3:11-CV-3424-L, 2012 WL 1977318, at *1 (N.D. Tex. May 31, 2012).

502 *Id.*

503 28 U.S.C. § 1332(c)(2) (2006).

504 *Lapkin*, 2012 WL 76318, at *2.

505 *Id.* at *3.

506 *Id.*

sal after it had denied Carrs's motion to remand and granted Lapkin's motion to remand.[507] Carrs had previously filed a similar action in state court in New York.[508] When Carrs's motion to remand the case filed in Texas state court and removed to the U.S. District Court for the Northern District of Texas was denied, Carrs sought voluntary dismissal of the case.[509] Coincidentally, the motion to remand was denied because none of the defendants had been served at the time of removal and one of the defendants was a citizen of Texas.[510] The court held that the "joined and served" requirement precluded remand because the Texas defendant had not yet been served.[511] AVCO opposed the motion for voluntary dismissal on the grounds that under New York law, comparative negligence was not available, and it would lose the comparative negligence defense permitted under Texas law if the case was litigated in New York.[512] The court rejected this argument, concluding that comparative negligence was available in New York, and the "real argument [was] that Texas's comparative negligence statute [was] more favorable to [AVCO] than New York law."[513] The court held that such a difference was not "legal prejudice," unlike losing an affirmative defense altogether, losing a forum non conveniens defense, or experiencing prejudice from a dismissal at "'a late stage of trial, after the defendant has exerted significant time and effort.'"[514] Finally, the court denied AVCO's motion for attorney's fees and costs as a condition of the voluntary dismissal because the court concluded that no other evidence beyond AVCO's arguments supported the claim of forum shopping and that there was a plausible explanation for originally filing suit in Texas—namely, the presence of a Texas defendant that might not have been subject to jurisdiction in New York.[515] The court therefore denied AVCO's motion for its attorney's fees and costs.[516]

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507 Carrs v. AVCO Corp., No. 3:11-CV-3423-L, 2012 WL 3777415, at *1 (N.D. Tex. Aug. 31, 2012).

508 *Id.*

509 *Id.*

510 *Id.*

511 *Id.*

512 *Id.*

513 *Id.* at *2.

514 *Id.* (quoting Davis v. Huskipower Outdoor Equip. Co., 936 F.2d 193, 199 (5th Cir. 1991)).

515 *Id.* at *2–3.

516 *Id.* at *3.

The prior decision denying Carrs's motion to remand is *Carrs v. AVCO Corp.*[517] In that decision, the U.S. District Court for the Northern District of Texas refused to read the "properly joined and served" language "completely out of the text of the statute."[518] Furthermore, the court determined that the presence of a Texas resident, but nevertheless diverse defendant, did not deprive the court of diversity subject-matter jurisdiction, and the presence of that in-state, diverse defendant was only a procedural bar that could be waived if not raised in a timely manner.[519] Finally, the court concluded that Congress could revise the statute in view of the clear conflict in its interpretation, but Congress had not done so.[520]

In *Agostini v. Piper Aircraft Corp.*, the U.S. District Court for the Eastern District of Pennsylvania determined that under the recent U.S. Supreme Court decision in *Hertz Corp. v. Friend*,[521] the proper venue for suit against a corporation is either the state in which it is incorporated or the state in which it has its "nerve center."[522] The district court rejected AVCO's argument that its nerve center was Massachusetts, where its corporate headquarters was located, instead of Williamsport, Pennsylvania, where its base of operations was located.[523] The court carefully examined the corporate structure and responsibility for day-to-day activities and concluded that the nerve center was a "place," and the only "place" where all of the corporate activities were conducted was Williamsport, Pennsylvania—not the corporate headquarters office in Massachusetts.[524] Indeed, the court concluded that "AVCO ha[d] not shown . . . *any* corporate activity [that] ha[d] been directed, controlled, or coordinated from Wilmington, Massachusetts."[525] The fact that many corporate officers were located in Massachusetts was not relevant because they were not at a "place" where the corporate business was conducted.[526] This case demonstrates the fact-intensive nature of corporate citizenship under the new *Hertz Corp. v. Friend* decision. The case was

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517 No. 3:11-CV-3423-L, 2012 WL 1945629 (N.D. Tex. May 30, 2012).

518 *Id.* at *3.

519 *Id.* at *2.

520 *Id.* at *3.

521 130 S. Ct. 1181 (2010).

522 Agostini v. Piper Aircraft Corp., No. 11-7172, 2012 WL 646025, at *4 (E.D. Pa. Feb. 29, 2012).

523 *Id.*

524 *Id.* at *4–5.

525 *Id.* at *4.

526 *Id.*

ultimately remanded to state court because AVCO was found to be a Pennsylvania resident, which precluded removal of this case filed in Pennsylvania state court.[527]

In *Lewis v. Lycoming*, another Pennsylvania federal district court judge considered a plaintiff's motion to remand; the case had been removed from Pennsylvania state court to the federal district court on the grounds that the defendant, AVCO, was a citizen of Pennsylvania and that removal was therefore improper under the resident non-removal rule.[528] This court considered that issue independently based on the evidence presented.[529] Under 28 U.S.C. § 1332(c)(1), a corporation is deemed a citizen of its state of incorporation as well as the state where it has its principal place of business.[530] Under the U.S. Supreme Court decision in *Hertz Corp. v. Friend*, a corporation can only have one principal place of business under the "nerve center" test.[531] AVCO's principal place of business had previously been determined to be Pennsylvania in *Agostini v. Piper Aircraft Corp.*[532] However, Judge Bartle in the *Lewis* case stated that it appeared "that the evidence produced by [AVCO] in that case was much more limited than what the record show[ed]" in *Lewis*.[533] Accordingly, Judge Bartle believed that he was free to reach a different conclusion.[534] Judge Bartle concluded that the public "persona" of AVCO was located in Pennsylvania, but that all of the corporate decisions were made by directors and officers located in Massachusetts; therefore, Massachusetts was the "nerve center" of the corporation and thus its principal place of business.[535] Judge Bartle's analysis is exhaustive and extensive, and it provided the basis for concluding that there was extensive control by AVCO over Lycoming.[536] Thus, the decision focused on the issue of the "place" where *control* is located.

The plaintiffs sought to impose the doctrine of collateral estoppel on AVCO to preclude the relitigation of the application

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527 *Id.* at *5.

528 Lewis v. Lycoming, No. 11-6475, 2012 WL 2422451, at *1 (E.D. Pa. June 7, 2012).

529 *See id.* at *4–7.

530 28 U.S.C. § 1332(c)(1) (2006).

531 Hertz Corp. v. Friend, 130 S. Ct. 1181, 1183 (2010).

532 *Agostini*, 2012 WL 646025, at *5.

533 *Lycoming*, 2012 WL 2422451, at *6.

534 *See id.*

535 *Id.* at *5–6.

536 *See id.* at *4–7.

of the nerve center test.[537] The court noted the decision in *Agostini v. Piper Aircraft Corp.*, which held that AVCO's principal place of business in Pennsylvania could not be reviewed on appeal pursuant to 28 U.S.C. § 1447(d) and was therefore an unappealable order.[538] Relying upon the *Restatement (Second) of Judgments*, the court concluded that because the prior order could not have been reviewed on appeal, the parties were not precluded from litigating the issue in a subsequent action.[539] The district court noted that while the Third Circuit did not address the specific issue of the finality of a remand order for purposes of issue preclusion, it did acknowledge that other federal and state courts had held that the remand order was not entitled to collateral estoppel effect.[540] The district court itself also noted other jurisdictions that had reached the same conclusion as to the collateral estoppel issue.[541] Finally, the court noted that issue preclusion should not apply to a determination of a corporation's principal place of business because its nerve center "may change over time."[542] As such, the determination of a corporation's principal place of business is to be determined at the time the complaint is filed, regardless of the determination of an earlier action prior to the filing of the later complaint.[543]

In *Snider v. Sterling Airways, Inc.*, the district court considered a motion to remand under the forum defendant rule based on the claim that certain "Teledyne defendants" were Pennsylvania citizens and were not fraudulently joined.[544] The case had been removed prior to service on the forum defendants, but the district court recognized the split of authority regarding the application of the "joined and served" language of 28 U.S.C. § 1441(b)(2).[545] The district court held that it would not support a "race to remove" because it did not believe that it advanced the "core purposes of diversity jurisdiction."[546] The court also stated that it must strictly construe the removal statute, even

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537 Lewis v. Lycoming, 876 F. Supp. 2d 497, 498 (E.D. Pa. 2012).

538 *Id.*

539 *Id.* at 498–99 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 28(1) (1982)).

540 *Id.* at 499.

541 *Id.*

542 *Id.*

543 *Id.*

544 Snider v. Sterling Airways, Inc., No. 12-cv-3054, 2013 WL 159813, at *1 (E.D. Pa. Jan. 15, 2013).

545 *Id.*

546 *Id.* at *2.

though it ignored the plain meaning of the words "joined and served."[547] The court noted that under the Supreme Court decision in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*,[548] the time for removal is "triggered by simultaneous service of the summons and complaint . . . but not by mere receipt of the complaint unattended by any formal service."[549] Thus, the court held that "filing of a notice of removal prior to formal service upon any of the [d]efendants does not permit us to ignore the presence of unserved forum Teledyne [d]efendants for purposes of the forum defendant rule."[550] The court also considered the fraudulent joinder argument, and concluded that the pleadings of the complaint filed against two former Teledyne entities that had not been in the aerospace business or affiliated with the other Teledyne defendants at the time of manufacture of the product nevertheless stated a claim because the complaint alleged that those defendants "knew of manufacturing and design defects in the engine components *at issue here* while . . . [those Teledyne entities were] still in the aerospace business and affiliated with the other Teledyne [d]efendants."[551] The court also concluded that the evidentiary showing by affidavit, rather than original documents, did not satisfy the "heavy burden" to establish that, by contract, these prior Teledyne entities had been relieved of any liability.[552] Finally, a third-party complaint had been filed against the United States, and the court rejected the argument that the third-party complaint precluded remand.[553] The court held that remand must be determined by the plaintiff's complaint at the time of filing, not by the subsequent addition of parties.[554]

In *Schiewe v. Cessna Aircraft Co.*, the district court considered the issue of remand in the presence of a claim against a resident defendant, which Cessna claimed was fraudulently joined or, in the alternative, should be realigned.[555] The resident defendant was the decedent's employer, and the plaintiff had asserted a claim against the employer for declaratory judgment to deter-

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547 *Id.*

548 526 U.S. 344 (1999).

549 *Snider*, 2013 WL 159813, at *3 (quoting *Murphy Bros.*, 526 U.S. at 347–48).

550 *Id.*

551 *Id.* at *4 (emphasis added).

552 *Id.*

553 *Id.* at *5.

554 *Id.* at *6–7.

555 Schiewe v. Cessna Aircraft Co., No. 11-CV-560-JHP-FHM, 2012 WL 707064, at *1–2 (N.D. Okla. Mar. 5, 2012).

mine the extent of its subrogation rights under Oklahoma worker's compensation law.[556] Cessna contended that there was still no basis for a declaratory judgment until a recovery had been made against Cessna, but the district court concluded that a concrete case and controversy existed and that the declaratory judgment was ripe for determination.[557] Cessna also contended that the worker's compensation insurer should have been aligned with the plaintiff against Cessna; however, Cessna had filed (and then voluntarily dismissed) a cross-claim against the worker's compensation carrier.[558] Based upon the worker's compensation carrier's potential indemnity liability to Cessna, the district court concluded that the plaintiff and the worker's compensation carrier had conflicting interests in the apportionment of any recovery between the worker's compensation carrier and the plaintiff.[559] For this reason, the district court refused to realign the worker's compensation carrier with the plaintiff.[560] Finally, another case was pending against Cessna, and the employer and the court concluded that a judgment in the absence of the employer would likely not be adequate to settle the dispute between all the parties involved.[561] Accordingly, the district court granted the plaintiff's motion to remand the case to state court.[562]

In *Murphy v. Cirrus Design Corp.*, the district court granted the plaintiff's motion to remand a case that had been filed in New York state court and arose from the crash of a Cirrus SR 22 aircraft in instrument meteorological conditions.[563] The plaintiff asserted claims against Cirrus Design Corporation, University of North Dakota Aerospace Foundation (UNDAF), and a New York flight instructor who was a Cirrus standardized instructor pilot.[564] Cirrus contended that the New York flight instructor was fraudulently joined on the theory that there was no possibility, based on the pleadings, that the plaintiff could state a cause of action against the non-diverse defendant in state court.[565] The

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556 *Id.* at *1–3.

557 *Id.* at *3–4.

558 *Id.* at *4.

559 *Id.*

560 *Id.*

561 *Id.* at *6.

562 *Id.*

563 Murphy v. Cirrus Design Corp., No. 11-CV-495S, 2012 WL 729263, at *1 (W.D.N.Y. Mar. 6, 2012).

564 *Id.*

565 *Id.* at *1–2.

futility of the plaintiff's claim against the New York flight instructor was based on the educational malpractice defense; however, the district court pointed out that it had recently decided that issue in the case of *In re Air Crash Near Clarence Center, New York*, in which the court held that a negligence flight training claim, while it resembled educational malpractice, "'could . . . be pled within the strictures of a traditional negligence or malpractice action.'"[566] Additionally, the court held that New York law would permit such a claim to be asserted not only by a student, but also by others who might be injured as a result of the negligent training.[567] Cirrus next contended that the New York flight instructor was not subject to individual liability because the complaint alleged that he was an agent of Cirrus or UNDAF.[568] The district court rejected the argument that an agent could not have individual liability because at the time he was acting at "'the behest of his principal.'"[569] The court also noted that the allegations of the complaint stated alternative theories against the defendants "*and each of them individually.*"[570] As such, the district court concluded that the complaint alleged claims for individual liability against the flight instructor, regardless of his alleged status as an agent of the defendants.[571] The district court granted the motion to remand and awarded attorney's fees to the plaintiff.[572] In a separate opinion, *Murphy v. Cirrus Aircraft Corp.*, the court reconsidered the award of attorney's fees but held that each of the legal theories against the resident plaintiff were either supported by recent developments in New York law, or that the claims against the flight instructor as an agent, as alleged in the complaint, "colorably asserted, at minimum, a negligence claim against" the flight instructor under New York law.[573] The request for reconsideration was therefore denied.[574]

In two related cases, the application of the procedural requirements for removal provided the plaintiffs a basis for re-

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[566] *Id.* at *2 (quoting *In re* Air Crash Near Clarence Center, N.Y., No. 09-CV-1039-1042, 2010 WL 5185106, at *6 (W.D.N.Y. Dec. 12, 2010)).

[567] *Id.* at *3.

[568] *Id.* at *2.

[569] *Id.* at *3 (quoting Zampatori v. United Parcel Serv., 479 N.Y.S.2d 470, 473–74 (N.Y. Sup. Ct. 1984)).

[570] *Id.*

[571] *Id.*

[572] *Id.* at *4.

[573] Murphy v. Cirrus Design Corp., No. 11-CV-495S, 2012 WL 1965446, at *2 (W.D.N.Y. May 31, 2012).

[574] *Id.*

mand, even though both diversity of citizenship and exclusive federal jurisdiction existed.

In the first case, *Jessup v. Continental Motors, Inc.*, the plaintiff filed products liability claims against multiple manufacturers, including Continental Motors, Inc. and certain Teledyne entities that had previously been involved in the aerospace business.[575] Continental filed a third-party complaint against the U.S. Forest Service (rather than against individual federal officers).[576] The Forest Service answered the third-party complaint, alleging that the state court lacked subject-matter jurisdiction, and then removed the case to federal court under 28 U.S.C. § 1442.[577] Upon removal, the Forest Service moved to dismiss the case based on lack of subject-matter jurisdiction under the "derivative jurisdiction doctrine."[578] The derivative jurisdiction doctrine provides that a federal court, upon removal under 28 U.S.C. § 1442, is limited to the jurisdiction alleged in the notice of removal to have existed in the state court.[579] Continental Motors and the Teledyne defendants objected to remand, arguing that the derivative jurisdiction doctrine did not apply to federal officer removal, and also that substantial federal questions rendered the exercise of federal jurisdiction proper.[580] The district court considered Congress's abolition of the derivative jurisdiction doctrine in 28 U.S.C. § 1441(f), and its refusal to eliminate it in 28 U.S.C. § 1442, and concluded that Congress had intentionally chosen not to change the doctrine under § 1442.[581] One of the reasons cited by the district court from the legislative history was the concern that defendants "seeking to escape a state court forum" would be encouraged to file suit against federal officers to cause them to remove the entire case to federal court.[582] The district court also rejected the argument that the existence of diversity jurisdiction over the remaining parties would preclude remand.[583] The issue of remand depends upon *the jurisdictional allegations in the notice of removal*, and because the Forestry Service was not required to and did not allege any juris-

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[575] Jessup v. Cont'l Motors, Inc., No. 12-CV-4439, 2013 WL 309895, at *1–2 (E.D. Pa. Jan. 24, 2013).

[576] *See id.* at *1.

[577] *Id.*

[578] *Id.* at *2.

[579] *Id.*

[580] *Id.*

[581] *Id.*

[582] *Id.* (quoting H.R. REP. No. 112-10, at 3 (2011)).

[583] *Id.* at *4.

dictional grounds in its § 1442 notice of removal, the non-removing defendants could not substitute additional grounds for the omitted jurisdictional references in the Forestry Service's notice of removal.[584] Finally, the court denied the motion for leave to amend the third-party complaint to include claims against individual federal officers because even if an additional basis for jurisdiction existed under 28 U.S.C. § 2697 for removal of claims against federal officers, the new additional bases for jurisdiction were not present in the notice of removal and therefore remedied neither "the jurisdictional defect in the third-party claims against the [Forestry] Service, nor . . . the absence of a plausible jurisdictional basis in the only operative notice of removal."[585] Thus, it is procedurally critical that any claims against federal officers be properly pled in state court so as to establish a basis for federal officer removal under 28 U.S.C. § 2697; attempting to assert those claims after removal will be insufficient.

The rules of unanticipated and unintended consequences, combined with the effect of timing on the assertion of third-party claims (either pre-removal or post-removal) against federal officers, dictated the result in the related case of *Snider v. Sterling Airways, Inc.*[586] In *Snider*, the Teledyne defendants removed the state court action to federal court prior to service on any of the defendants, seeking to avoid the application of the forum defendant rule, which precludes removal if any of the "properly joined and served" defendants are citizens of the forum state.[587] Two of the Teledyne defendants were citizens of Pennsylvania, but since they had not been served, the other Teledyne defendants argued that the forum defendant rule did not apply.[588] The district court, recognizing a conflict among the federal circuit courts, district courts, and even the judges within the Eastern District of Pennsylvania, refused to apply the literal requirement that any forum defendants must have been served to invoke the forum defendant rule.[589] The court also rejected the argument that these forum defendants had been fraudulently joined on the ground that the complaint's allegations governed and that

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584 *Id.*

585 *Id.*

586 Snider v. Sterling Airways, Inc., No. 12-CV-3054, 2013 WL 159813 (E.D. Pa. Jan. 15, 2013).

587 *Id.* at *1 (quoting 28 U.S.C. § 1441(b)(2) (2006)).

588 *Id.* at *2.

589 *Id.* at *2–3.

those allegations stated that the forum defendants "knew of manufacturing and design defects" while still in the aerospace business.[590] The court also rejected the argument that Continental Motors, Inc. had assumed any liability from these prior aerospace Teledyne defendants because it was not clear from any documentary evidence, either quoted or submitted to the court, that the allegation was true.[591] The court stated that the Teledyne defendants had not met the "heavy burden to show that the Plaintiffs did not state colorable claims against [the forum defendants]."[592]

Finally, the Teledyne defendants had filed a third-party complaint against the Forestry Service, which the Teledyne defendants contended established an additional basis for federal subject-matter jurisdiction.[593] The district court held that the "longstanding rule of considering the propriety of removal based solely on the state court pleadings at the time of removal" precluded consideration of any post-removal bases for establishing subject-matter jurisdiction when the complaint, as it existed at the time of removal, was subject to remand for failing to satisfy the procedural requirements of 28 U.S.C. § 1441.[594] The district court denied the plaintiffs' request for attorneys' fees for the remand because the initial contention that the forum defendant rule was not applicable until they were served was a matter of division among the courts and therefore removal had been based upon substantial reasonable authority.[595]

C. Forum Non Conveniens

In *Arik v. Boeing Co.*, the Illinois Court of Appeals denied a forum non conveniens motion to dismiss and upheld the exercise of jurisdiction over Boeing for a Turkish accident.[596] The court found that the private interest factors did not favor adjudicating the case in Turkey since many U.S. witnesses were required and could not be compelled to appear in Turkey.[597] The court also determined that the public interest factors, including

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590 *Id.* at *4.
591 *Id.*
592 *Id.*
593 *Id.* at *4–5.
594 *Id.* at *6.
595 *Id.* at *7.
596 Arik v. Boeing Co., No. 1-10-0750, 2011 IL App (1st) 100750-U, at *2–3 (Ill. App. Ct. Jan. 10, 2012).
597 *Id.* at *6.

the manufacture of the aircraft by an Illinois corporation and U.S. involvement in the investigation of the aircraft certified under the Federal Aviation Regulations, favored the lawsuit occurring in the United States rather than in Turkey.[598] This case illustrates two problems for manufacturers involved in foreign accidents. First, unless there is a mass disaster, federal-question subject-matter jurisdiction under 28 U.S.C. § 1369 is not available.[599] Therefore, plaintiffs can file these cases in state courts but removal to federal court may be limited. Additionally, state courts, unlike federal courts, may be less inclined to dismiss a case based upon forum non conveniens, particularly if a manufacturer from within that state is a defendant.[600]

Some federal courts, like their state court counterparts, may also be unwilling to freely grant a forum non conveniens dismissal in favor of a resident defendant. In *Lewis v. Lycoming*, Judge Bartles, after having carefully analyzed diversity removal jurisdiction under the *Hertz v. Friend* "principal place of business" analysis as to the AVCO defendants and after denying the plaintiff's motion to remand to state court, next considered the defendants' forum non conveniens motion.[601] The accident involved in this case occurred in the United Kingdom, and the two decedents were both British subjects and residents of the United Kingdom.[602] Judge Bartles concluded that the United Kingdom was an adequate alternative forum, even though two defendants, Precision Airmotive, LLC and Precision Airmotive Corporation, had filed voluntary petitions for Chapter 11 bankruptcy and the action was stayed with respect to those defendants.[603] The court concluded that in the absence of some indication that there would be relief from the stay, the location of these defendants in the United States did not preclude a determination that the United Kingdom was "an adequate alternative forum . . . for all the other defendants and for the Precision Defendants if the stay [was] lifted."[604] Next, the court considered the level of deference to be given to the plaintiffs' choice of forum, noting that even though the plaintiffs were British subjects, the question raised by the plaintiffs' choice of forum is more appropriately

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598 *Id.* at *7.

599 *See id.* at *1–4.

600 *See id.* at *6–9.

601 Lewis v. Lycoming, 917 F. Supp. 2d 366, 369 (E.D. Pa. 2013).

602 *Id.*

603 *Id.* at 370–71.

604 *Id.* at 371.

whether an assumption should be made that the forum is not a convenient one for a non-U.S. plaintiff.[605] The court noted that all defendants were located in the United States, and that this "demonstrate[d] at least some convenience."[606] Accordingly, the court would not "'disturb [the plaintiffs'] choice of forum [unless] defendants . . . establish[ed] a strong preponderance in favor of dismissal.'"[607]

In this case, the plaintiffs' counsel had come "into possession and ownership of the wreckage" and caused it to be moved to the United States.[608] Even though the defendants argued that this had been done to facilitate litigation in the United States, the district court accepted the plaintiffs' contention that it was primarily to make the wreckage more accessible for inspection and testing by the parties.[609] The court concluded that, regardless of the reason, the wreckage was now in Delaware, and that "[m]oving it back across the Atlantic [for use at trial] would be costly and inconvenient."[610] The court also noted that records relating to the manufacture of the products were in the United States, as were the manufacturer's employees who might be witnesses.[611] While the court noted that there might be some evidence in the United Kingdom, particularly training records, there were no eyewitnesses to the crash, and the defendants had not established that other witnesses, such as mechanics, passengers and pilots on prior helicopter flights, family members, flight instructors, first responders, and accident investigators, "outweigh[ed] the importance of the witnesses, documents[,] and other evidence present . . . in the United States."[612] Additionally, the plaintiffs had shown that there were other prior manufacturers who were not parties, but who were important witnesses, and therefore that it was necessary to have subpoena power over those witnesses to compel their testimony.[613] The defendants had indicated the possibility of a third-party complaint against those who performed maintenance, those who trained the pilots, and certain pilots themselves.[614] The defendants con-

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605 *Id.*
606 *Id.*
607 *Id.* (quoting Lacey v. Cessna Aircraft Co., 932 F.2d 170, 179 (3d Cir. 1991)).
608 *Id.*
609 *Id.*
610 *Id.*
611 *Id.* at 371–72.
612 *Id.* at 372.
613 *Id.*
614 *Id.*

tended that the statute of limitations on any third-party claims had expired in the United Kingdom, and the court conceded that this was a practical problem that weighed in favor of the defendants.[615] Finally, the court considered whether there would be any undue delay if the action remained in the Eastern District of Pennsylvania; the court indicated there would "be no undue delay if th[e] action remain[ed] before the undersigned."[616] The court also concluded that both the United Kingdom and United States had a public interest in the case, but the fact that there were eleven U.S. corporations sued for products liability and negligence in the United States caused the United States' interest to outweigh the United Kingdom's interest.[617] Ultimately, the district court concluded that "the unfairness of burdening citizens" of Pennsylvania was "not unrelated to this litigation" because the "engine was designed and manufactured in [Pennsylvania], and [the] other defendants have offices and facilities [in Pennsylvania]."[618] Thus, the court concluded that the defendants failed to meet their "heavy burden to establish that the 'balance of these [private and public interest] factors tips decidedly in favor of a trial in a foreign forum.'"[619]

In *Schlotzhauer v. XL Specialty Insurance Co.*, the Illinois Court of Appeals affirmed the denial of a forum non conveniens motion filed by XL Specialty with regard to a coverage issue arising from an Iowa crash involving an Iowa helicopter operator and a claim for wrongful death of an Iowa resident.[620] The only Illinois contact with XL Specialty was the presence of a regional office in Chicago that had been opened after the filing of the lawsuit.[621] The Illinois trial court held that the forum non con-

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615 *Id.* at 373–74.

616 *Id.* at 374.

617 *Id.* at 375. This public interest factor is often a dispositive element in forum non conveniens motions. In those cases in which forum non conveniens motions have been denied, both Illinois and Pennsylvania courts have focused on public interest in assuring safe products manufactured by resident corporations, whereas many other courts have held that the public interest in providing compensation to accident victims, addressing the issues of negligence or fault by foreign residents within their own countries, and other factors outweighed any interest that the United States might have in policing products made in the United States. *See id.* at 377.

618 *Id.* at 376.

619 *Id.* at 377 (quoting Windt v. Qwest Commc'ns Int'l, Inc., 529 F.3d 183, 192 (3d Cir. 2008)).

620 Schlotzhauer v. XL Specialty Ins. Co., No. 12-0395, 2012 IL App (1st) 120395-U, at *1–3 (Ill. App. Ct. Oct. 10, 2012).

621 *Id.* at *5.

veniens motion should be denied because the plaintiff was entitled to its choice of forum unless there was "no practical connection" with Illinois.[622] The defendant argued that key witnesses were available only in Iowa, and that they could not be compelled to appear in Cook County for trial.[623] The plaintiff contended that there were five potential witnesses in Cook County and other witnesses throughout Kansas, Pennsylvania, Iowa, Connecticut, and New York; therefore, multiple states had a connection to the litigation.[624] The appellate court concluded that the trial court had not abused its discretion, in part because XL Specialty

> offered no affidavit from any witness expressing an unwillingness to travel to Illinois[,] . . . failed to identify the county in the proposed state [that would be a more convenient forum], failed to calculate the distances between the chosen and proposed forums and the locations of witnesses and other evidence, and failed to provide affidavits from any witness as to the inconvenience posed by [the] plaintiff's chosen forum.[625]

The court noted that where "potential trial witnesses are scattered among several counties, including the plaintiff's chosen forum, and no single county enjoys a predominant connection to the litigation[,] . . . [t]he balance of factors must strongly favor transfer of the case before the plaintiff can be deprived of his chosen forum."[626]

Notwithstanding the strong preference in favor of both resident and nonresident plaintiffs' choice of forum, and also notwithstanding the public interest of insuring the safety of products manufactured and sold in the forum state, other courts have afforded less deference to both resident and nonresident plaintiffs where the majority of the plaintiffs were nonresidents and the witnesses and evidence were located outside the United States, even though a basis existed for finding that the United States had an interest in assuring the safety of products manufactured in the United States.[627]

In *Fortaner v. Boeing Co.*, the Ninth Circuit reviewed the forum non conveniens dismissal of 116 consolidated lawsuits arising

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[622] *Id.* at *4–5 (quoting First Am. Bank v. Guerine, 764 N.E.2d 54 (Ill. 2002)).

[623] *Id.* at *5.

[624] *Id.* at *5–6.

[625] *Id.* at *6–7.

[626] *Id.* at *7.

[627] *See infra* notes 453–72 and accompanying text.

from the crash of a Spanair flight from Spain.[628] One hundred fifty-four people were killed and eighteen others were injured, none of whom were U.S. citizens or residents.[629] The lawsuits were consolidated by the Judicial Panel on Multidistrict Litigation in the Central District of California.[630] Boeing filed a motion to dismiss based on forum non conveniens, "arguing that the suits should proceed in Spain."[631] Initially, the plaintiffs argued that Spain was "not an adequate forum because civil claims could be stayed there while criminal proceedings were pending."[632] However, the Spanish criminal proceedings had concluded, and therefore the court ruled that these concerns were now moot.[633] After evaluating both the private and public interest factors, the trial court concluded that Spanish evidence, particularly that pertaining to Boeing's claims of negligence against the flight crew and ground personnel, or alternatively, the fault of other Spanish actors, could reduce the manufacturer's liability.[634] Boeing denied that the accident was due to any defect in the aircraft, alleging that it was solely the result of negligence by third parties.[635] The district court concluded that "cockpit recordings, information about the crash, and the results of investigations by Spanish authorities would be more difficult to access in the United States than in Spain."[636] The district court also gave greater weight to Spain's interest as the locale of the crash site, as well as to the existence of docket congestion in the Central District of California, and concluded that this outweighed "California's interest as the site of the airplane's manufacturer."[637]

In another case from the Central District of California, *Harp v. Airblue Ltd.*, the district court considered a forum non conveniens motion in a case arising from a July 2008 plane crash near Islamabad, Pakistan, that killed all 152 people onboard.[638] Initially, the case had been filed on behalf of numerous non-U.S. citizen plaintiffs; however, those plaintiffs had settled, and

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628 Fortaner v. Boeing Co., 504 F. App'x 573, 580 (9th Cir. 2013).
629 *Id.*
630 *Id.*
631 *Id.*
632 *Id.*
633 *Id.*
634 *Id.* at 581.
635 *See id.*
636 *Id.*
637 *Id.*
638 Harp v. Airblue Ltd., 879 F. Supp. 2d 1069, 1071–72 (C.D. Cal. 2012).

the forum non conveniens motion was filed with regard to two U.S. citizens, one Austrian citizen, one Australian citizen, one Somali citizen, and two British citizens.[639] The plaintiffs contended Pakistan was not an adequate alternative forum.[640] The court rejected generalized concerns relating to amenability of process and whether there was a satisfactory remedy under Pakistani law; claims of systematic corruption and bias in the Pakistani judicial system; lengthy delays in reaching trial; obstacles to discovery; prohibitive costs in hiring local counsel; and potential danger to one of the plaintiffs, a U.S. citizen whose mother was Pakistani, on the grounds that he was "extremely fearful of traveling to Pakistan given the reports of terrorism, kidnapping, and murders directed against American citizens."[641] The district court rejected all of these arguments as not establishing that Pakistan was not an adequate alternative forum.[642] The court also considered the private and public interest factors and held that under *Piper Aircraft v. Reyno*,[643] even when a U.S. citizen chooses to litigate in the United States, the "'citizen's forum choice should not be given dispositive weight.'"[644] The district court stated that where "'the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.'"[645] In balancing the private interests, only one of the five plaintiffs was a U.S. citizen, and that citizen was a resident of Georgia, not California.[646]

In considering the other private interest factors, the plaintiff argued that Pakistani law "impose[d] a strict liability regime for aviation accidents," and therefore access to Pakistani evidence or witnesses was not a factor.[647] However, the plaintiff's complaint alleged only claims for negligence, and the defendant claimed that the evidence and witnesses necessary to defend itself against negligence claims were all located in Pakistan.[648] Additionally, the court stated that "[i]n aviation accident cases, this private interest factor almost uniformly favors the forum where

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639 *Id.* at 1071.
640 *Id.* at 1072.
641 *Id.* at 1073–75.
642 *See id.*
643 454 U.S. 235, 255 (1981).
644 *Harp*, 879 F. Supp. 2d at 1076 (quoting *Reyno*, 545 U.S. at 252).
645 *Id.* (quoting *Reyno*, 545 U.S. at 252).
646 *Id.* at 1076–77.
647 *Id.* at 1076.
648 *Id.*

the accident occurred."[649] Additionally, compulsory process and unwilling witnesses were available in Pakistan but not in the United States, and the cost of bringing even willing witnesses to trial in the United States would certainly be greater.[650] As for the public interest factors, the case did not involve a products liability claim, but rather involved a claim against an airline that was headquartered and had its principal place of business in Islamabad, was regulated by Pakistan's civil aviation authority, and had never operated flights to or from the United States.[651] Thus, there was no public interest in California, and given the substantial number of Pakistani citizens who died in the accident in comparison to the number of American citizens, "the United States' interest in the suit pale[d] in comparison to Pakistan's."[652] Finally, the court noted that since Pakistani law would control, the familiarity of the Pakistani courts versus the federal courts' lack of familiarity with Pakistani law also favored dismissal, as did "[t]he burden on local courts and juries unconnected to the case[,] and the costs of resolving a dispute unrelated to the forum,"[653] along with the "local interest in having localized controversies decided at home."[654]

IX. CHOICE OF LAW

In *National Union Fire Insurance Co. v. American Eurocopter Corp.*, the Fifth Circuit Court of Appeals considered a case involving a helicopter crash in Hawaii and contribution claims made by National Union against American Eurocopter and Eurocopter SAS.[655] The Hawaii federal district court had ruled that personal jurisdiction over American Eurocopter in Hawaii was lacking and transferred the case to the U.S. District Court for the Northern District of Texas.[656] That district court determined that Texas law, including Texas choice-of-law rules, would govern because the transfer was not under 28 U.S.C. § 1404, under which the transferor court's choice-of-law rules would apply, but rather

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649 *Id.* at 1077.

650 *Id.*

651 *Id.* at 1078.

652 *Id.*

653 *Id.* (quoting Vivendi SA v. T-Mobile USA, Inc., 586 F.3d 689, 696 (9th Cir. 2009)).

654 *Id.* (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).

655 Nat'l Union Fire Ins. Co. v. Am. Eurocopter Corp., 692 F.3d 405 (5th Cir. 2012).

656 *Id.* at 407.

was a transfer based on lack of personal jurisdiction; therefore, the transferee court's choice-of-law rules would apply.[657] The district court held that Texas law applied, and under Texas law, there is no right of contribution where one of the alleged tortfeasors settles out of court and brings a contribution claim against other alleged tortfeasors.[658] The Fifth Circuit denied National Union's appeal with regard to the jurisdictional issues in the Hawaii federal district court, holding that it did not have jurisdiction over those issues; the court therefore proceeded to review the district court's choice-of-law analysis under the "most significant relationship" test in the *Restatement (Second) of Conflicts of Laws*.[659] The court held that even though the accident occurred in Hawaii, the relationship between the parties was centered in Texas and was based primarily upon a Texas choice-of-law provision in the parts supply contract between the manufacturer and the operator of the helicopter.[660] Finally, the court held that Texas public policy strongly favored the application of Texas law because the rule against contribution for out-of-court settlements reflects Texas's public policy against "'permit[ting] a joint tortfeasor the right to purchase a cause of action from a plaintiff to whose injury the tortfeasor contributed.'"[661]

X. INSURANCE COVERAGE

In *Global Aerospace, Inc. v. Platinum Jet Management, Inc.*, the Eleventh Circuit Court of Appeals, in an unpublished decision, addressed whether Global Aerospace, the managing agent of a pool of three insurance companies, had standing to bring suit against a charter airline (to which Global had issued a policy) for declaratory judgment and the return of expenses and settlement funds that had been expended in defending the airline after the crash of one of its planes.[662] After the crash, a federal grand jury indicted the airline's principals and others for violations concerning the operation of the aircraft.[663] Global Aero-

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657 *Id.* at 408 & n.3.

658 *Id.* at 409.

659 *Id.* at 407–10; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145, 173 (2010).

660 *Nat'l Union Fire Ins. Co.*, 692 F.3d at 408–09.

661 *Id.* at 409 (quoting Int'l Proteins Corp. v. Ralston-Purina Co., 744 S.W.2d 932, 934 (Tex. 1988)).

662 Global Aerospace, Inc. v. Platinum Jet Mgmt., Inc., 488 F. App'x 338, 339–40 (11th Cir. 2012).

663 *Id.* at 339.

space sued the airline upon learning of the indictment, alleging that the airline had sought to impede Global Aerospace's investigation.[664] The airline failed to timely respond to Global Aerospace's complaint, and a default judgment was entered by the district court.[665] The airline moved to set aside the default judgment and moved to dismiss Global Aerospace's complaint, alleging that subject-matter jurisdiction did not exist because Global Aerospace had not suffered an injury-in-fact because as a mere agent of the pooling insurance companies, it had not suffered a monetary loss.[666] The Eleventh Circuit rejected the airline's argument, finding that as the pooling agent, Global Aerospace had the right to direct and control the insurance claims, thus giving it standing to bring the declaratory judgment action.[667] Additionally, the court found that by contracting in its own name for the benefit of the insurance companies, Global Aerospace had representative standing to sue for the benefit of the insurance companies.[668]

In *Oxford Aviation, Inc. v. Global Aerospace, Inc.*, an aircraft refurbishing and repair company sued its insurance company for failing to defend it against a lawsuit brought by one of its customers.[669] In the underlying suit, the customer had alleged, among other claims, that the repair shop's negligence and faulty performance caused an aircraft window to break when the customer was flying the aircraft.[670] Although the U.S. District Court for the District of Maine ruled that no duty to defend existed, the First Circuit Court of Appeals reversed.[671] In doing so, the court first noted that under Maine law, an "insurer must defend so long as the claims in the complaint create even a remote possibility of coverage."[672] Additionally, it noted that a "complaint need only 'disclose[ ] a *potential* for liability within the coverage.'"[673] The court concluded that the claims involving the cracked window in the underlying action fell within the cover-

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664 *Id.*

665 *Id.*

666 *Id.* at 339–40.

667 *Id.* at 340.

668 *Id.* at 340–41.

669 Oxford Aviation, Inc. v. Global Aerospace, Inc., 680 F.3d 85, 87 (1st Cir. 2012).

670 *Id.* at 86–87.

671 *Id.* at 92.

672 *Id.* at 87.

673 *Id.* (quoting Travelers Indem. Co. v. Dingwell, 414 A.2d 220, 227 (Me. 1980)).

age provision of the policy addressing bodily injury or property damage caused by an occurrence, since "occurrence" was defined to mean an accident.[674] After concluding that the window claim fell within one of the policy's coverage provisions, the court analyzed whether one of the policy's exclusions negated the duty to defend.[675] The insurance company argued that the policy's exclusions for "business risks" excluded coverage for the repair shop's faulty work.[676] Specifically, it pointed to the exclusions for (1) repair or replacement work necessitated by the insured's work; (2) damage to a product; and (3) impaired property.[677] The court held that none of these exclusions applied to the crack in the window because (1) the crack occurred away from the insured's shop and thus could not be considered the shop's work; (2) the window was not the insured's product; and (3) while the impaired property exclusion could bar a claim for the loss of use of the aircraft caused by the cracked window, it could not bar a claim for damage to the window itself.[678]

In *López & Medina Corp. v. Marsh USA, Inc.*, the First Circuit Court of Appeals considered an appeal from the U.S. District Court for the District of Puerto Rico in which the plaintiff, a travel and tour company, brought a direct action against the coinsurers of a direct air carrier and indirect air carrier for damages caused to it when the air carriers breached a charter contract.[679] The tour company brought the action based on Puerto Rico's direct action statute, which allows a third party to bring an action against an insurer for claims covered under an insurance policy without having to join the insured to the dispute.[680] The First Circuit affirmed the district court's grant of summary judgment in favor of the insurers.[681] In doing so, the court held that to be successful under the Direct Action Statute, there had to be coverage under the policy for the alleged loss.[682] In the context of the tour company's claim, the court held there was

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[674] *Id.* at 88.

[675] *Id.* at 88–89.

[676] *Id.* at 89.

[677] *Id.* at 89–90.

[678] *Id.* at 91–92.

[679] López & Medina Corp. v. Marsh USA, Inc., 667 F.3d 58, 60–61 (1st Cir. 2012).

[680] P.R. LAWS ANN. tit. 26, § 2003 (2010); *López & Medina Corp.*, 667 F.3d at 61–62.

[681] *López & Medina Corp.*, 667 F.3d at 69.

[682] *Id.* at 66.

no coverage because its claim against the air carriers sounded in breach of contract, which was not covered under the policy.[683]

In *Estate of Vasquez-Ortiz v. Zurich Compania de Seguros, S.A.*, a foreign citizen asked a friend who was a U.S. citizen to set up a U.S. corporation to be the owner of the foreign citizen's airplanes so that the planes could be registered in the United States.[684] The foreign citizen owned no part of the corporation.[685] Insurance was purchased for the aircraft from Zurich in the name of the corporation.[686] While piloting one of the airplanes that he had purchased but was owned by the corporation, the foreign citizen was involved in a crash that took his life and the life of a passenger.[687] The estate of the passenger brought suit against the foreign citizen's estate and the corporation.[688] The foreign citizen's estate tendered the claim to Zurich, and Zurich rejected the tender, indicating that there was no coverage.[689] The estate then sued Zurich, alleging breach of contract and breach of the duty of good faith and fair dealing, among other claims.[690] Zurich moved for summary judgment on the grounds that the estate lacked standing to bring the claim since the foreign citizen was not a party to the insurance contract.[691] Despite the fact that the foreign citizen was not a party to the contract, the estate argued that it had standing either because the foreign citizen was an alter ego of the corporation or because he was an intended beneficiary under the policy.[692] The court rejected both of the estate's arguments.[693] In rejecting the alter-ego theory, the court found that the alter-ego claim was designed for the purpose of allowing a creditor to bring a claim against a corporate owner and was not designed to allow a corporate owner to file an action against a company that assumed in good faith that it was dealing with a corporation and not an individual.[694] In rejecting the intended beneficiary argument,

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683 *Id.* at 66–69.

684 Estate of Vasquez-Ortiz v. Zurich Compania de Seguros, S.A., No. H-11-2413, 2013 WL 105005, at *1 (S.D. Tex. Jan. 8, 2013).

685 *Id.*

686 *Id.*

687 *Id.* at *2.

688 *Id.*

689 *Id.*

690 *Id.*

691 *Id.* at *3.

692 *Id.* at *4–5.

693 *Id.*

694 *Id.* at *4.

the court found no evidence that the contract was intended to confer a benefit to the foreign citizen.[695]

In *World Trade Center Properties, LLC v. Certain Underwriters at Lloyd's*, lease holders of the twin towers destroyed in the September 11, 2001, terrorist attack filed suit against their insurers, seeking a declaration that they were entitled to priority for sums collected by their insurers in subrogation actions filed against certain aviation defendants.[696] At issue was the language in two policy forms addressing division of amounts collected as a result of subrogation actions.[697] One of the forms provided that the net amount collected after deducting the cost of the recovery was to be distributed first to the insured "for the deductible amount retained and for any uninsured loss or damage resulting from the exhaustion of limits under this policy or primary or excess policy(ies)."[698] The second form provided that after the deduction of costs, the proceeds were to be "divided between each party instituting such proceedings in the same proportion as each such party has borne the provable loss."[699] The main dispute between the parties under either form was whether the leaseholders could count their entire loss toward priority or proportion (the leaseholders' position), or whether they could count only legally recognizable tort damages (the insurers' position).[700] After reviewing the relevant language, the court held that both forms only allowed priority or proportion to legally recognizable tort damages.[701] The court reasoned that legally recognizable tort damages were the only category of damages that the insurers were able to seek against the aviation defendants in the subrogation action, and counting other categories of damages toward priority or proportion would create an unwarranted windfall.[702] The court further reasoned that accepting the leaseholder's interpretation would not be in line with the business purposes sought to be achieved by the parties to the insurance policies since there would be no mitigation to the insurers as a result of bringing the subrogation action.[703]

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695 *Id.* at *5.

696 World Trade Ctr. Props., LLC v. Certain Underwriters at Lloyd's, 906 F. Supp. 2d 295, 299 (S.D.N.Y. 2012).

697 *Id.* at 300.

698 *Id.* at 303.

699 *Id.* at 304.

700 *Id.* at 303.

701 *Id.* at 304–05.

702 *Id.* at 303–04.

703 *Id.* at 304.

In *United States Aviation Underwriters, Inc. v. Bill Davis Racing, Inc.*, United States Aviation Underwriters (USAU) filed a declaratory judgment action seeking a declaration that there was no covered loss for an aircraft that was alleged to have been stolen from its insured, Bill Davis Racing (BDR).[704] BDR filed a counterclaim alleging unfair and deceptive trade practices and bad faith refusal to settle.[705] The facts of the case establish that USAU issued an All-Clear Aircraft Policy to BDR for an Embraer turboprop aircraft.[706] Under the policy, covered "'[o]ccurrences' [were] defined as 'any accident or continuous or repeated exposure to conditions which you don't expect to happen resulting in bodily injury, property damage[,] or loss of or damage to your aircraft.'"[707] The policy excluded coverage for loss or damage to the aircraft caused when someone with legal right to possess the aircraft embezzled it.[708] At some point after the policy was issued, the aircraft was flown to Honduras and partially disassembled, which BDR claimed occurred without its knowledge or permission.[709] "BDR submitted a proof of claim under the Policy, contending that the loss of the aircraft was the result of 'theft.'"[710] USAU denied coverage in part by claiming that the loss occurred as a result of embezzlement and filed a motion for judgment on the pleadings, alleging that the pleadings established as a matter of law that the loss was the result of embezzlement.[711] It further requested judgment on BDR's counterclaims, asserting that BDR failed to allege a sufficient basis for its claims.[712] In support of its embezzlement argument, USAU pointed to BDR's answer in which BDR admitted that it had provided limited authorization to a company known as Renaissance Air to move the aircraft to an airport in Miami, Florida, for maintenance.[713] BDR responded by arguing that it had not transferred any legal interests, rights, control, or ownership of the aircraft, and that while it consented to the aircraft being flown to Miami, it never consented to the aircraft being

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704 U.S. Aviation Underwriters, Inc. v. Bill Davis Racing, Inc., No. 1:11CV141, 2012 WL 3656416, at *1 (M.D.N.C. Aug. 24, 2012).

705 *Id.*

706 *Id.*

707 *Id.*

708 *Id.*

709 *Id.*

710 *Id.*

711 *Id.* at *1, 3.

712 *Id.* at *3.

713 *Id.* at *3 & n.2.

flown to Honduras.[714] The court denied the motion as to the embezzlement argument, holding that the facts were sufficiently disputed to prevent the court from determining as a matter of law that BDR had given Renaissance sufficient authority to render the taking of the aircraft an embezzlement rather than a theft.[715] The court did grant USAU's motion with respect to BDR's counterclaims, holding that BDR's general allegations regarding USAU's alleged unfair and deceptive trade practices, as well as its alleged bad faith refusal to settle, did not meet the pleading requirements set forth in *Bell Atlantic Corp. v. Twombly*.[716]

XI. EVIDENCE AND DISCOVERY

A. ADMISSIBILITY OF GOVERNMENT REPORTS

In *Smith v. United States*, the surviving spouse of a man who was killed when he crashed a Piper Arrow brought suit against the United States.[717] The widow alleged that government employees had negligently maintained and inspected the aircraft, which caused her husband to become disoriented and crash after carbon monoxide accumulated in the cabin.[718] Relying on the learned treatise exception to the hearsay rule, the plaintiff attempted to introduce a variety of studies and reports as exhibits, including an FAA publication regarding engine systems failure, a CAA publication regarding toxic gases and fumes in airplanes, and a U.S. Army Aeromedical Research Laboratory publication regarding the effect of carbon monoxide and altitude on aviator performance.[719] The court rejected this evidence with the explanation that a learned treatise may not be admitted as an exhibit; rather, it may only be read into evidence.[720] In addition, the court refused to admit a portion of a federal regulation offered by the plaintiff as an exhibit because "[i]t is axiomatic that a court must determine the law which is applicable in a particular suit."[721]

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714 *Id.* at *4.

715 *Id.*

716 *Id.* at *6 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)).

717 Smith v. United States, No. 3:95cv445, 2012 WL 1453570, at *1 (S.D. Ohio Apr. 26, 2012).

718 *Id.*

719 *See id.* at *12–16.

720 *Id.* at *12.

721 *Id.* at *17.

In *Echevarria v. Caribbean Aviation Maintenance Corp.*, the widow and children of a pilot killed in a helicopter crash filed suit against Robinson Helicopter Co., Caribbean Aviation Maintenance Corp., and Chartis Insurance Company.[722] The parties disputed the admissibility of NTSB factual reports relating to the accident at issue and also disputed the admissibility of NTSB reports for other past accidents.[723] The court explained that it is important to distinguish between "Factual Accident Reports" and "Board Accident Reports" because the former are generally admissible and the latter generally are not.[724] Even Factual Accident Reports may be inadmissible where they contain hearsay, lack indicia of trustworthiness, or are too prejudicial.[725] The court determined that the NTSB reports at issue were Factual Accident Reports because they contained the factual background of the accident and no opinions or conclusions as to the probable cause of the accident.[726] However, the court refused to admit the reports because hearsay was dispersed throughout them, and it would have required considerable time to "weed [it] out."[727] Also, the court was of the opinion that the NTSB reports relating to past accidents were potentially prejudicial to the defendant.[728]

In *Pease v. Lycoming Engines*, the plaintiff suffered significant injuries when his Piper aircraft crashed.[729] After the accident, the plaintiff initiated a products liability suit against Lycoming, the manufacturer of the plane's engine.[730] Lycoming moved in limine to exclude various service difficulty reports, airworthiness directives, and service bulletins offered into evidence by the plaintiffs.[731] Regarding the airworthiness directives and service bulletins, Lycoming argued that this was evidence of subsequent remedial measures and therefore inadmissible.[732] However, the court held that measures taken after the sale of a product but

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722 Echevarria v. Caribbean Aviation Maint. Corp., 839 F. Supp. 2d 464, 465 (D.P.R. 2012).

723 *Id.*

724 *Id.* at 465–66.

725 *Id.* at 466.

726 *Id.* at 467.

727 *Id.*

728 *Id.*

729 Pease v. Lycoming Engines, No. 4:10-CV-00843, 2012 WL 162551, at *1 (M.D. Pa. 2012).

730 *Id.*

731 *Id.* at *2.

732 *Id.* at *4–5.

before the event causing harm are not subsequent remedial measures.[733] In addition, the court held that the service difficulty reports were admissible, but only for the non-hearsay purpose of showing that Lycoming had notice of the engine's defective design.[734]

The claims in *Ressler v. United States* were based on the crash of a commercial airliner.[735] The plaintiffs alleged that the FAA's negligence caused the crash.[736] One issue in the case was whether the claims were barred by the statute of limitations.[737] To prove that the claims were not barred, the plaintiffs sought to offer the NTSB report, which they claimed contained facts that first alerted them to the cause of action.[738] The United States sought to exclude the report on the ground that it was a final report that could not be relied upon in a civil action pursuant to applicable statutes and regulations.[739] The plaintiffs argued that the prohibition extended only to the NTSB's determinations and probable cause findings, not to the existence of the report itself.[740] However, the court rejected this argument and held that the statutory and regulatory ban prohibited the plaintiffs' proposed use of the final report as an exhibit to their response to the United States' motion to dismiss on statute of limitations grounds.[741]

In *Delacroix v. Doncasters*, the plaintiffs asserted products liability claims in connection with the crash of a Twin Otter airplane.[742] The defendant, Doncasters, was the manufacturer of replacement compressor turbine (CT) blades that had been installed on the airplane prior to the crash.[743] In a motion for judgment notwithstanding the verdict, Doncasters argued that the trial court erred in excluding evidence of FAA certification offered to prove that the CT blades were not defective.[744] How-

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733 *Id.*

734 *Id.* at *5.

735 Ressler v. United States, No. 10-cv-03050-REB-BNB, 2012 U.S. Dist. LEXIS 134621, at *6 (D. Colo. Sept. 19, 2012).

736 *Id.*

737 *Id.*

738 *Id.* at *7.

739 *Id.*

740 *Id.* at *9.

741 *Id.* at *9–10.

742 Delacroix v. Doncasters, No. ED97375, 2013 WL 1890267, at *1 (Mo. Ct. App. Jan. 15, 2013).

743 *Id.*

744 *See id.* at *11–12.

ever, the appellate court held that the trial court did not commit plain error by excluding the certification evidence because compliance with minimal federal standards does not mitigate a manufacturer's responsibility under the theory of strict liability.[745]

B. Admissibility of Expert Testimony

In *Leahy v. Signature Engines, Inc.*, the widow of a deceased pilot that was killed in an airplane crash brought suit against a corporation that had overhauled the aircraft engine shortly before the accident.[746] The plaintiff's theory was that the overhaul was negligently performed because a breach in an engine exhaust pipe was not detected.[747] The defendant's theory was that a fuel system on the plane that had not been approved by the FAA leaked and caused an engine fire that resulted in the crash.[748] Both sides moved to exclude the testimony of the other side's expert.[749] First, the defendant challenged the opinions of the plaintiff's experts on the ground that they failed to engage in sufficient testing and analysis, but the court rejected these challenges because testing was not necessarily required given the nature of the opinions offered.[750] Second, the plaintiff challenged the opinion of the defendant's expert on the ground that he failed to engage in adequate testing and analysis, but the court held that these criticisms went only to the weight and not the admissibility of the evidence.[751] Lastly, the court observed that both parties had submitted expert declarations in support of their response to the other party's motion to exclude, and it explained that an expert may not amend or alter prior opinions in response to an opposing party's challenge of the reliability of those opinions.[752] However, neither party offended this rule because an expert may explain or supplement his or her opinion with additional evidence.[753]

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745 *Id.*

746 Leahy v. Signature Engines, Inc., No. 1:10-cv-070, 2012 WL 1476072, at *1 (S.D. Ohio Apr. 24, 2012).

747 *Id.* at *1, 3–4.

748 *Id.* at *4.

749 *Id.* at *1.

750 *See id.* at *5–10.

751 *See id.* at *11–12.

752 *Id.* at *12–13.

753 *Id.*

In *Leahy v. Lone Mountain Aviation, Inc.*, the same widow brought suit against a different company, alleging negligent performance of service on the aircraft prior to the crash.[754] The defendant later moved to exclude all of the plaintiff's expert testimony on the ground that it did not aid the trier of fact and did not meet the reliability requirements of Federal Rule of Evidence 702.[755] However, the court observed that the "[d]efendant [did] not specify the exact opinions that [were] inadmissible" and was not "clear as to the factual grounds supporting each argument."[756] Rather, the defendant cited excerpts of the depositions and NTSB reports that arguably contradicted the testimony of the plaintiff's experts, pointed out a lack of testing to simulate the accident, and coupled this with a request that the court find each witness's testimony completely inadmissible.[757] Based on the foregoing, the court was "not persuaded that the [plaintiff's] witnesses rel[ied] on insufficient facts or data, or that their testimony [was] the product of unreliable principals and methods, or unreliable application of the facts to those principles and methods."[758]

In *Echevarria v. Caribbean Aviation Maintenance Corp.*, the widow and children of a pilot killed in a helicopter crash filed suit against Robinson Helicopter Co., Caribbean Aviation Maintenance Corp., and Chartis Insurance Company.[759] The defendant moved to exclude the testimony of the plaintiffs' expert witnesses.[760] First, the court rejected the argument that the plaintiffs' accident reconstructionist, who was trained as an engineer and accident investigator, was not qualified to testify regarding helicopter maintenance or compliance with FAA regulations.[761] Second, because his report was grounded in his review of depositions and NTSB reports, the court rejected the argument that the accident reconstructionist's testimony was based on unsupported speculation.[762] Third, the defendant successfully argued that the plaintiffs' flight instructor was not qual-

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754 Leahy v. Lone Mountain Aviation, Inc., No. 2:10-cv-0082-GMN-PAL, 2012 WL 4482458, at *1 (D. Nev. Sept. 25, 2012).

755 *Id.* at *3–4.

756 *Id.* at *3.

757 *Id.* at *3–4.

758 *Id.*

759 Echevarria v. Caribbean Aviation Maint. Corp., No. 09-2034 (GAG), 2012 WL 253130, at *1 (D.P.R. Jan. 26, 2012).

760 *Id.* at *2–3.

761 *See id.*

762 *See id.*

ified to testify regarding helicopter maintenance.[763] Fourth, the court rejected the argument that the plaintiffs' metallurgist, who also had considerable experience in accident reconstruction and crash investigation, was not qualified to testify regarding helicopter maintenance.[764] Fifth, notwithstanding that he had never piloted an R-44 helicopter, the court rejected the argument that the plaintiffs' pilot, who had logged "over 5,000 [flight] hours in 120 types of fixed wing and helicopter models," was not qualified to testify as to the piloting of the R-44 helicopter.[765] Lastly, notwithstanding that there might be some repetition, the court rejected the argument that the testimony of the plaintiffs' expert witnesses was needlessly cumulative.[766]

In a second evidentiary dispute, the defendant in *Echevarria v. Caribbean Aviation Maintenance Corp.* sought to preclude the plaintiffs' economic experts from testifying.[767] First, the defendant argued that the economic loss assessment was faulty because it included compensation for years after the deceased pilot would have been expected to retire, but the court held that the age of the deceased pilot's probable retirement was a question for the jury.[768] Next, the defendant argued that the proposed testimony on economic loss was faulty because it included interest on economic losses from the time the complaint was filed until the time of judgment; the court precluded this evidence because "prejudgment interest should not be added unless the court finds a party acted with obstinance."[769] Further, the defendant argued that the economic loss testimony was erroneous because it provided for expected salary increases but did not provide evidence in support of those increases.[770] The court, however, explained that the fact that the income of the deceased fluctuated over time did not necessitate a finding that his income would not have increased over time.[771] Additionally, the defendant argued that testimony concerning a planned business venture was too speculative, but the court admitted the evidence for the purpose of showing that the deceased did not plan to

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763 *See id.* at *4.

764 *See id.* at *4–5.

765 *See id.* at *5–6.

766 *Id.* at *6.

767 Echevarria v. Caribbean Aviation Maint. Corp., 841 F. Supp. 2d 588, 590 (D.P.R. 2012).

768 *Id.*

769 *Id.* at 590–91.

770 *Id.* at 591.

771 *Id.*

retire at an early age.[772] Lastly, the court held that stock owned by the deceased was passive income that should not have been calculated as lost earnings.[773]

In a third evidentiary dispute, the plaintiffs in *Echevarria v. Caribbean Aviation Maintenance Corp.* sought to preclude the defendants' expert on maintenance and mechanics from testifying regarding matters beyond his expertise.[774] The argument was essentially that the defendants' maintenance and mechanics expert lacked the necessary expertise to contradict the plaintiffs' metallurgy and accident reconstruction expert.[775] However, because the court was satisfied that the opinions of the mechanics and maintenance expert did not go beyond hardware installation and maintenance, it refused to preclude his testimony.[776] The court also disagreed that segments of the expert's opinion only summarized the deposition testimony of several defense mechanics.[777]

In a fourth evidentiary dispute, a defendant in *Echevarria v. Caribbean Aviation Maintenance Corp.* sought to preclude the testimony of a co-defendant's accident reconstruction expert who proposed to testify regarding faulty helicopter maintenance provided by the first defendant's mechanics.[778] The basis for the challenge was that the testimony was unsubstantiated, speculative, and unreliable.[779] However, the court rejected the argument that the expert's testimony was based on unsupported speculation.[780] Rather, the opinion was based on evidence in the record that had been validated by the NTSB, suggesting its reliability.[781] The court found that the criticisms relating to the expert's testimony went to the weight of the evidence and not its admissibility.[782]

In a fifth evidentiary dispute, a defendant in *Echevarria v. Caribbean Aviation Maintenance Corp.* again sought to preclude the

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772 *Id.*

773 *Id.* at 591–92.

774 Echevarria v. Caribbean Aviation Maint. Corp., No. 09-2034 (GAG), 2012 U.S. Dist. LEXIS 6380, at *7 (D.P.R. Jan. 19, 2012).

775 *Id.* at *9.

776 *See id.* at *10–11.

777 *Id.* at *11.

778 Echevarria v. Caribbean Aviation Maint. Corp., 841 F. Supp. 2d 565, 567 (D.P.R. 2012).

779 *Id.* at 567.

780 *Id.* at 568–69.

781 *Id.* at 569.

782 *Id.*

testimony of a co-defendant's expert.[783] The argument was that the expert was unqualified to testify regarding aircraft maintenance issues.[784] However, the witness had forty years of experience as a military and civilian helicopter pilot, had logged more than 20,000 flight hours, and had supervised mechanics in his post-retirement years.[785] Accordingly, the court rejected the argument that the witness was unqualified to testify regarding maintenance issues, even though he did not hold an FAA Airframe and Powerplant Mechanic's Certificate.[786]

In a sixth evidentiary dispute, the plaintiffs in *Echevarria v. Caribbean Aviation Maintenance Corp.* sought to preclude all testimony regarding the pilot's legal status to fly pursuant to FAA regulations.[787] The plaintiffs' argument was that the methodology employed by the expert in formulating his opinion was flawed.[788] However, the court was satisfied that the expert, who had access to the pilot's logbook and NTSB materials, was sufficiently informed to make the determination that the pilot was not in compliance with FAA regulations.[789] It was not necessary to put an official from the FAA on the stand to demonstrate noncompliance with FAA regulations.[790] Further, the expert, who had gained familiarity with the design of the helicopter at issue by reading the pilot's operating manual and by attending a training and safety course sponsored by the manufacturer, was sufficiently qualified to give an opinion about the crashworthiness of the helicopter.[791]

In *Ferguson v. Lear Siegler Services*, the plaintiff sought to recover damages from the defendant, a helicopter manufacturer, for injuries he sustained in a helicopter crash.[792] The plaintiff's theory was that "an uncommanded-cyclic movement occurred" as a result of the accumulation of barium in the helicopter's hy-

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783 Echevarria v. Caribbean Aviation Maint. Corp., No. 09-2034 (GAG), 2012 WL 130243, at *1 (D.P.R. Jan. 17, 2012).

784 *Id.*

785 *Id.* at *2.

786 *Id.*

787 Echevarria v. Caribbean Aviation Maint. Corp., 839 F. Supp. 2d 467 (D.P.R. 2012).

788 *Id.* at 470.

789 *Id.*

790 *Id.*

791 *Id.* at 471.

792 Ferguson v. Lear Siegler Servs., No. 1:09cv635-MHT (WO), 2012 WL 1058983, at *1 (M.D. Ala. Mar. 28, 2012).

draulic system.[793] To support this theory, the plaintiff offered the testimony of an aerospace engineer who investigated the crash and concluded that the barium caused an uncommanded cyclic movement.[794] The helicopter manufacturer moved to exclude the testimony of the engineer on the ground that he was unqualified to testify regarding the effect of barium on servo actuators and that his opinions were unreliable.[795] In response, the court first held that the engineer was qualified because he had extensive knowledge of aerodynamics, servo actuators, and helicopter flight.[796] Second, while conceding that it was a close call, the court held that there was reliable scientific evidence supporting the engineer's conclusions.[797] His testimony was "grounded in published peer-reviewed research and the conclusions that he reache[d] [were] consistent with those of the Army's own internal investigation of the crash."[798] Further, it was permissible under the circumstances that the engineer relied heavily on studies conducted by others and did not conduct any tests on the crash helicopter's servo actuators.[799] Lastly, criticisms relating to an article that the engineer relied upon in forming his opinions went to the weight of the evidence and not its admissibility.[800]

In *Smith v. United States*, the pilot of a Piper Arrow aircraft perished in a crash.[801] His surviving spouse and estate brought suit against the United States, alleging negligent maintenance and inspection of the aircraft by government employees.[802] The plaintiff requested that the court strike the testimony of three government witnesses.[803] The testimony of the first witness was challenged because it was allegedly contradicted in part by a federal regulation, but the court held that this criticism went only to the weight of the testimony and not its admissibility.[804] The testimony of the second witness was challenged because the ex-

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793 *Id.*

794 *Id.*

795 *Id.* at *3.

796 *See id.* at *3–4.

797 *See id.* at *5–7.

798 *Id.* at *5.

799 *Id.* at *6–7.

800 *Id.* at *7.

801 Smith v. United States, No. 3:95cv445, 2012 WL 1453570, at *1 (S.D. Ohio Apr. 26, 2012).

802 *Id.*

803 *Id.* at *38.

804 *See id.* at *40.

pert used a novel method of testing carboxyhemoglobin (COHb) blood saturation, but the court refused to strike the testimony because the methodology used by the expert had been peer reviewed and had gained general acceptance.[805] The testimony of the third witness was challenged because his claim that COHb levels exceeding 18% are necessary to cause measurable impairment in a pilot was allegedly inconsistent with an FAA regulation, but the court rejected the argument that this was a sufficient reason to exclude his testimony.[806]

In *Schaefer-Condulmari v. US Airways Group,* the plaintiff brought suit after suffering an allergic reaction to a meal served aboard the defendant's airline.[807] The defense moved to exclude the testimony of two expert witnesses.[808] The testimony of the first expert was allegedly deficient because the methodology used by the expert to diagnose and rule out alternative causes for the plaintiff's post-traumatic stress disorder (PTSD) was unreliable, but the court rejected the argument that inconsistency with medical practice guidelines was a sufficient reason for excluding the testimony as unreliable.[809] The testimony of the second expert, an allergist, was successfully challenged because the expert lacked the expertise needed to testify about PTSD.[810]

In *Sulak v. American Eurocopter Corp.*, a helicopter pilot and several passengers were killed in a crash while on a sightseeing flight in Hawaii.[811] The NTSB concluded that the crash occurred because of separation between the lower portion of the hydraulic system and the main rotor blade.[812] In the course of litigation, the helicopter manufacturer moved to exclude the testimony of the deceased pilot's accident reconstruction expert based on the assertion that he lacked expertise and did not employ reliable methods.[813] The expert proposed to testify that "the crash was a result of 'the design of the rod end fitting, the lock washer, and the installation instructions provided in the

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805 *Id.* at *42.

806 *See id.* at *43–45.

807 Schaefer-Condulmari v. US Airways Grp., No. 09-1146, 2012 WL 2920375, at *1 (E.D. Pa. July 18, 2012).

808 *Id.* at *4.

809 *Id.* at *5.

810 *Id.*

811 Sulak v. Am. Eurocopter Corp., No. 4:09-CV-651-Y, 2012 WL 6567237, at *1 (N.D. Tex. 2012).

812 *Id.*

813 *Id.* at *6.

Eurocopter . . . Maintenance Manual.'"[814] The court rejected the argument that the expert, who held advanced degrees in physics, mechanical engineering, and aeronautical engineering, was ill-qualified because he lacked helicopter design experience.[815] Also, the court rejected the argument that the expert's methodology was unreliable owing to a lack of scientific testing.[816] Rather, his "opinions [were] based on a reasonable investigation, [were] the result of his engineering expertise, and provide[d] a reasonable link between the reviewed information and the conclusions."[817] The court also rejected the argument that the expert's decision to discount the causative effect of an error during maintenance as a cause of the crash made his opinion unreliable.[818]

In *Pease v. Lycoming Engines*, a plaintiff who was injured in a plane crash brought suit against the manufacturer of the aircraft engine.[819] During the litigation, the engine manufacturer sought to preclude expert testimony from four witnesses regarding the pilot's economic damages.[820] The engine manufacturer's chief argument was that the testimony regarding the pilot's economic damages was based on materials that were never produced in discovery.[821] The court agreed that the materials at issue should have been produced, but it disagreed that exclusion of the testimony was the appropriate sanction.[822] The engine manufacturer suffered only nominal prejudice, and the prejudice was ameliorated because a firm trial date had not been set.[823] Also, the court did not agree that the vocational experts had "cherry picked" favorable earnings data.[824] Further, the court rejected the argument that testimony from a nurse regarding the pilot's expected medical and life care expenses was based on unfounded assumptions.[825] Next, the court held that testimony of the pilot's neuropsychology expert was relevant

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814 *Id.* at *7 (internal quotation marks omitted).

815 *Id.* at *8.

816 *Id.* at *9–10.

817 *Id.* at *9.

818 *Id.* at *10.

819 Pease v. Lycoming Engines, No. 4:10-CV-00843, 2012 WL 162551, at *1 (M.D. Pa. Jan. 19, 2012).

820 *Id.* at *7.

821 *Id.*

822 *Id.* at *9.

823 *Id.*

824 *See id.* at *10.

825 *See id.* at *11.

and reliable.[826] Lastly, the court held that the pilot's treating physicians should have been disclosed as experts, but they were not required to produce expert reports, and exclusion of their testimony was not an appropriate sanction for failing to disclose them.[827]

C. Admissibility of Evidence of Other Accidents

In aircraft accident cases, the general rule in both federal and state courts is that evidence of prior accidents is admissible at trial only if the prior accident occurred under the same or substantially similar circumstances as the accident at issue. Decisions in 2012 on this issue were consistent with this general rule.

In *Lidle v. Cirrus*, the Second Circuit Court of Appeals affirmed the U.S. District Court for the Eastern District of New York on several evidentiary issues, including the exclusion of evidence of a prior incident.[828] The *Lidle* case stemmed from an October 11, 2006, accident in which a student pilot and his instructor were killed when a Cirrus Model SR20 G2 aircraft crashed into an apartment building on Manhattan's Upper East Side while attempting to avoid controlled airspace surrounding LaGuardia Airport.[829] The plaintiffs claimed that the accident was caused by "[a rudder-aileron interconnect] lockup where the Adel clamp crossed over and locked on a bungee clamp."[830] The parties presented twenty-three fact and expert witnesses and extensive documentary evidence during a one-month trial, after which a jury rendered its verdict in favor of the defendant Cirrus.[831]

One of the district court's evidentiary rulings challenged by the plaintiffs on appeal was the exclusion of evidence of a prior incident.[832] After noting the general rule with respect to the admission of evidence of prior incidents, the district court concluded that the plaintiffs had failed to show that the prior incident was caused by the same purported defect in the aircraft.[833] The Second Circuit upheld the district court's ruling,

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826 *See id.* at *11–12.

827 *See id.* at *14.

828 Lidle v. Cirrus, 505 F. App'x 72, 73, 77 (2d Cir. 2012).

829 *Id.* at 73–74.

830 *Id.* at 75 (quotation marks omitted).

831 *Id.* at 74.

832 *Id.* at 75.

833 *Id.* ("Merely alleging some problem with the flight control systems was and is not enough.").

noting that the district court did admit evidence of another incident involving a Cirrus Model SR20 aircraft which the court found sufficiently similar to the Lidle accident.[834]

Similarly, after a state trial court excluded evidence of twenty-six incidents because none of them were substantially similar to the accident in question, the defendant appealed the case based on the trial court's failure to grant a mistrial after the plaintiffs' counsel alluded to the other incidents.[835] In *Delacroix v. Doncasters, Inc.*, multiple plaintiffs filed claims for wrongful death after the July 29, 2006, crash of a DHC-6 Twin Otter being flown for skydiving expeditions.[836] The accident, which took the lives of all five people on board, occurred shortly after takeoff when the right engine failed.[837] The original CT blades in the Pratt & Whitney engine had been replaced with CT blades manufactured by the defendant Doncasters.[838] The plaintiffs' experts testified at trial that the coating used on the replacement blades was prone to cracking, and that the base metal alloy used on the replacement CT blades had low oxidation resistance.[839] The experts then opined that the coating cracked, providing a pathway for the oxidation, leading to the fracture of a single CT blade and the resulting engine failure.[840]

After a verdict in favor of the plaintiffs, Doncasters appealed on several issues.[841] Among them, Doncasters "claim[ed] that the trial court erred in denying its motion for mistrial after [the] Plaintiffs, in violation of the trial court's ruling, introduced evidence of other incidents that were not substantially similar to [the] Plaintiffs' theory of the Twin Otter crash."[842] After hearing testimony outside the presence of the jury, the trial court had excluded any evidence of the other incidents, finding that none of them were substantially similar.[843] Despite this ruling, during the cross-examination of one of Doncasters's experts, counsel for the plaintiffs asked whether "Doncasters

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834 *Id.* at 75 n.1.

835 Delacroix v. Doncasters, Inc., No. ED97375, 2013 WL 1890267, at *4–5 (Mo. Ct. App. Jan. 15, 2013).

836 *Id.* at *1.

837 *Id.*

838 *Id.*

839 *Id.*

840 *Id.*

841 *Id.* at *1–2.

842 *Id.* at *4.

843 *Id.*

[knew] that this happens."[844] Over the objection of counsel for Doncasters, the plaintiffs' counsel then asked the expert whether Doncasters had "reports of it . . . in a catastrophic . . . dangerous situation."[845]

After Doncasters moved for a mistrial, "the jury was dismissed for the day while counsel continued to argue the motion to the trial court."[846] On "[t]he following morning, the trial court denied the motion for mistrial and issued a curative instruction for the jury to disregard counsel's question."[847]

On appeal, the Missouri Court of Appeals found "that any prejudice that may have resulted from the alleged violation of the trial court's ruling was cured by the trial court['s]" instruction.[848]

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[844] *Id.*
[845] *Id.*
[846] *Id.*
[847] *Id.*
[848] *See id.* at *5.


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